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# Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 32

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF OF APPELLANT

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IN THE

# Supreme Court of the United States

OCTOBER TERM—1925.

No. 207.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

*vs.*

THE UNITED STATES.

## BRIEF OF APPELLANT.

### Nature of the Appeal.

This is an appeal from judgment of the Court of Claims entered April 28, 1924; from order overruling Motion for a New Trial and for Additional and Amended Findings of Fact; from order overruling motion to incorporate in the record on appeal Motion for New Trial and Motion for Amended and Additional Findings of Fact (R., 11).

### Statement.

1. The Appellant, Luckenbach Steamship Company, Inc., operated for years prior and up to August 3, 1917, a fleet consisting of five tugs and twelve barges, of the market value of $5,279,500 at the time taken by defendant (R., 3-5).

2. Pursuant to the provisions of the Act of Congress of June 15th, 1917, (Chap. 29, 40 U. S. Stat. 182) defendant

commandeered on August 3rd, 1917, the entire fleet of Appellant, consisting of five tugs and twelve barges and took possession of the five tugs on October 12th and of the twelve barges on October 18th, 1917 (R., 7).

3. Surveys of said tugs and barges were made before they were commandeered and taken by representatives of defendant especially assigned for that purpose and report made giving detailed description of their construction and condition and expressing opinion as to value. After the tugs and barges were taken, surveys were made for the purpose of ascertaining their then conditions and reports were made showing that they were substantially in the same condition as at the time surveys were previously made.

4. The surveys were made by representatives of defendant and, however competent they may be to survey and determine the construction and condition of the tugs and barges, not one of them was competent to testify as to market value.

5. The men assigned by defendant to make the surveys reported $1,065,000 as their judgment of the value of the tugs and barges.

6. The surveys were turned over to the Board of Appraisal and furnished the only basis upon which the Board of Appraisal fixed the value of the property taken.

7. No member of the Board of Appraisal inspected said tugs and barges or had personal knowledge of their construction or condition at the time taken, nor did either of the members have knowledge of the market value of tugs and barges at that time, nor was either of them qualified to determine market value.

8. Notwithstanding the fact that the finding of the Board of Appraisal was based solely on the surveys, the value of the separate tugs and barges differs radically as shown in the surveys and value found by the Board of Appraisal, there being a difference of $174,455 in the value of one tug and a difference of $335,000 in the value of the fleet between the value shown in the surveys and that found by the Board of Appraisal.

9. The value of the tugs and barges fixed by the Board of Appraisal was based solely on the surveys and the amount thereof fixed by them and accepted by the President and the Court of Claims as "just compensation."

10. Appellant was not satisfied with the amount of compensation adjudged; refused to accept that amount as in full of "just compensation"; received payment of 75% thereof and on December 7th, 1917, executed bill of sale, and thereafter brought this action to recover the "just compensation" guaranteed by the constitution.

11. There was no tender or offer to pay the amount adjudged as "just compensation" *at the time adjudged*, nor tender or offer to pay the amount fixed as the value at the time taken *with interest*.

12. Evidence was taken in different parts of the United States. Appellant made numerous objections to evidence offered by defendant; which objections were noted in the record, but were never considered or passed on by the Court.

13. Appellant objected to printing certain portions of the evidence taken, but the Court refused to consider or pass on its objection and included in the printed record so

called evidence that no Court could consider and accept—going to the extent of including in the record the evidence of one witness that appellant was expressly denied the right to cross examine.

14. The only competent evidence before the Court of Claims of the character and condition of the tugs and barges at the time they were taken is contained in the surveys made by defendant and introduced in evidence by appellant.

15. The only competent evidence before the Court of Claims upon which opinion or expert evidence could be heard, is the surveys made by the defendant and put in evidence by appellant.

16. The only witnesses who gave expert or opinion evidence based solely on the tugs and barges as shown by the official surveys made by defendant were the nine witnesses offered by appellant.

17. The "market value" is the basis upon which compensation must be determined. Evidence was offered by appellant, but ignored by the Court, of the cost of reproducing the tugs and barges at the time they were taken and that of their earning power at that period, as throwing light on market value.

18. The only competent evidence before the Court of Claims of the market value of the tugs and barges at the time they were taken is that of the *nine* expert witnesses who testified on the assumption that the tugs and barges were of the construction and condition as set forth in the surveys made by defendant, that they were of the aggregate value of more than four million dollars; the value as

testified to by the nine expert witnesses being respectively $4,268,000; $4,784,500; $4,582,300; $4,224,100; $4,983,250; $6,014,920; $4,806,300; $4,650,000; $4,650,000. The average being $4,773,707.

19. The Court of Claims clearly states that its judgment is not based on the evidence in the record. The Court specifically states that

> "much of the evidence submitted is wholly irrelevant and does not concern the value of the tugs and barges at the time they were taken; the expert evidence is vague and indefinite, and is largely, if not altogether, speculative and conjectural (R., 10).

The Conclusion of the Court as to the value of the tugs and barges is unequivocally stated to be based on the "value placed upon the tugs and barges of the plaintiff by the Board of Appraisal"—and does not purport to be based on the evidence.

20. The judgment makes no provision for the payment of interest or any sum in lieu thereof, notwithstanding the law as construed by this Court makes it clear that when the United States condemns and takes property the owner is not limited to the value of the property at the time of the taking but is also entitled to such additional sum as will produce the full equivalent of that value paid *contemporaneously with the taking* and interest at the legal rate is declared to be a just measure by which to ascertain the amount so to be added.

21. After the Court of Claims rendered judgment, appellant made and filed with the Court of Claims motions which were disposed of as follows:

"(a) On June 26, 1924, motion for New Trial and Motion for Additional and Amended Findings of Fact and Conclusions of Law (Exhibit A), which was by the court overruled, and Claimant's application for appeal allowed on October 20th, 1924 (p. 11).

(b) On November 3rd, 1924, motion to incorporate in the record on appeal claimant's motion for New Trial and motion for Additional and Amended Findings of Fact and Conclusions of Law, which was by the court overruled on November 15th, 1924, and the clerk was 'directed in making up the record to *comply with the rule in the Supreme Court*' (p. 11).

(c) On November 13th, 1924, notice of, and motion for, Appeal to the Supreme Court of the United States from the order of Court of Claims of October 20th, 1924, denying and overruling motion for New Trial and Additional and Amended Findings of Fact and Conclusions of Law was made, and appeal from final order was allowed on November 15th, 1924 (p. 11).

(d) On November 17th, 1924, appeal herein as prepared by the clerk of the Court of Claims was filed in the court, in which reference is made to Claimant's motion for New Trial and for Additional and Amended Findings of Fact and Conclusions of Law (Exhibit A), but the same and the papers on which based are omitted from the record, and the clerk of the Court of Claims refused on demand to embrace the same in the record.

(e) On December 1st, 1924, Claimant moved in open court, 'To direct the clerk of this court to amend and supplement the record now on file herein in the Supreme Court, so as to embrace therein as

a part of the record the Claimant's motion for a New Trial and motion to find Additional and Amended Findings of Fact and Conclusions of Law and the papers on which the same was made.'

Or in the alternative:

To direct the clerk of this court to prepare and deliver to Claimant to be filed in the United States Supreme Court a record of case on appeal by Claimant, Luckenbach Steamship Company, Inc., from the final order of the court made October 20th, 1924, denying and overruling motion of Claimant for a New Trial and motion to find Additional and Amended Findings of Fact and Conclusions of Law, and to embody therein the motions as filed and the papers on which the same were made."

Motion was by the court overruled on December 2nd, 1924.

22. Appeal as prepared and certified by the Clerk of the Court of Claims was filed in this Court on November 18th, 1924, the same being in such form as to withhold and conceal from this Court the facts necessary for intelligent consideration of the facts and the law involved herein. In practical effect trial in the Court of Claims is reduced to a nullity and the production of evidence made superfluous and a waste of the time of court and counsel.

23. Appellant filed in this Court on April 20th, 1925 "Motion to Remand with Directions" with accompanying brief. This motion was on April 27th, 1925 continued by order of this Court to be heard and determined on hearing of the appeal herein, and is asked to be considered a part hereof, and that the brief filed with said motion be treated as a part of this brief.

## Errors Assigned.

Appellant states that the Findings of Fact, Conclusions of Law and the Judgment by the Court of Claims were erroneous, and assigns the following errors—

1. The Court erred in rendering a judgment supported by no competent evidence which confiscates appellants' property and deprives it of the "just compensation" guaranteed by the Constitution.

2. The Court erred in determining the amount of "just compensation", in failing and refusing to allow interest or an amount equal to interest from the time of taking until paid.

3. The Court erred in denying Appellants' Motion for New Trial and Motion for Additional Findings of Fact and Conclusions of Law.

4. The Court erred in refusing to embrace in and make a part of the record on appeal, Appellant's Motion for New Trial and Motion for Additional Findings of Fact and Conclusions of Law and the papers upon which the same are based.

5. The Court erred in holding that the record on Appeal herein is made in compliance with the rules of the Supreme Court, for that there is no rule of this court which prevents the Court of Claims from certifying a record which contains copy of motions made from the denial of which appeal was taken.

6. The Court erred in that the Motion for New Trial is not permitted to be made a part of the record on appeal.

7. The Court erred in finding that "The Board of Appraisal made an exhaustive examination of these tugs and barges at the time, or just before the time, they were taken, and the valuation arrived at by the Board is fair and liberal."

Whereas, the Board of Appraisal made no examination of the tugs and barges; not a member saw or inspected any of them, but based their findings entirely on the surveys made by men assigned by the Navy to make the surveys; the value found shown by the surveys and that found by the Board of Appraisal differ $174,455 in the value of one tug and $335,000 in the fleet.

8. The Court erred in that it refused to apply amendment V of the Constitution of the United States and adjudge "just compensation" for the property taken.

9. The Court erred in that it deprived appellant of "due process of law" in that, among other things, the Court

(a) Based its judgment on the findings of the Board of Appraisal and not on the evidence;

(b) Refused to act on objections to evidence made by appellant;

(c) Refused to exclude incompetent and irrelevant evidence;

(d) Overruled motion for New Trial and Motion for Additional Facts and Conclusions of Law;

(e) Overruled motion to incorporate in the record on appeal Motion for New Trial and Motion for Additional Facts and Conclusions of Law;

(f) Overruled motion to make the record on appeal speak the truth and embody in the record Mo-

tion for New Trial and Motion for Additional Facts and Conclusions of Law.

10. The Court erred in holding that its determination of "just compensation" adjudged was based "upon a careful consideration of all the evidence in the case."

11. The Court erred in its characterization and description of the evidence upon which its opinion is alleged to have been based:

> "Much of the evidence submitted is wholly irrelevant and does not concern the value of the tugs and barges at the time they were taken" (R. 10).

In that it failed to limit its characterization of the evidence to that offered by defendant, and in not limiting its description of the expert evidence to that offered by defendant. So limited, its finding is correct, to wit, defendant's

> "expert evidence is vague and indefinite, and is largely, if not altogether, speculative and conjectural" (R. 10).

12. The Court erred in that it refused to render judgment based only on the competent evidence and in overruling the well settled law that those seeking relief must assume the burden of proof by competent evidence, and if the party upon whom the burden rests fails in that respect he must fail.

13. The Court erred in that it overruled without consideration appellant's objection to printing and making a part of the record certain incompetent evidence offered by defendant and printed and erroneously made a part of the record.

14. The Court erred in that it refused to examine, pass on or exclude incompetent evidence offered by defendant which was objected to by appellant (the same being designated in "Motion to Remand with Directions" and exhibit thereto attached and before the Court on this appeal).

15. The Court erred in Finding of Fact II in that the facts are put in such relation to each other, and relevant facts so carefully excluded, as to convey an impression contrary to the evidence and necessarily misleading.

16. The Court erred in failing to find in lieu of Finding of Fact II the Findings of Fact requested by appellant (shown in exhibit to Motion to Remand, beginning on p. 1) which states facts proven by the competent evidence.

## POINT I.

**"Just compensation" requires not only payment of the market value of the property at time of taking but interest thereon until paid.**

The amount found by the Board of Appraisal as the market value of the five tugs and twelve barges at the time they were taken in 1917, was accepted and fixed by the President as the "just compensation" to which appellant was entitled, and the Court of Claims adjudges that payment of 75% of same several months thereafter, and payment more than six years thereafter of the portion of that amount not heretofore paid, complies with the constitutional requirement of making "just compensation".

The owner is entitled to be compensated for what is taken from him, and the compensation must be "a full and perfect equivalent for the property taken" (*Hudson Navigation Co.* vs. *U. S. Ct. Cls.* June 12, 1922).

Until the cases of *Seaboard Air Line Railway* vs. *U. S.* (261 U. S. 299) and *City of New York* vs. *U. S.* (261 U. S. 200) and the cases therein cited are repudiated and overruled by this court, the law is settled that the owner of property taken for public use is entitled to be paid the market value of the property taken at the time of taking and payment of a sum in addition thereto which will give the full equivalent as if the market value had been paid at the time of taking.

The Seaboard case (261 U. S. 299) is one in which the land of the plaintiff was condemned and taken by the United States for public use under the provisions of the Lever Act. The Board of Appraisal found the market value at the time of taking to be $235.80 and the President, following the usual custom, *pro forma*, declared the owner entitled to that amount as "just compensation."

Not satisfied, the Seaboard sought redress in the United States District Court, and a jury found that the property at the time of taking was of the market value of $6,000, and judgment was rendered for that amount with interest.

From this judgment the defendant appealed on the ground that interest could not be allowed. The Circuit Court of Appeals sustained defendant's contention and eliminated the interest.

From this judgment the Seaboard appealed to the United States Supreme Court and the judgment of the Circuit Court was reversed, interest allowed, in an opinion by a unanimous court. This opinion makes it clear that

interest on market values is part of the payment necessary to comply with the constitutional requirement of making "just compensation."

In the Seaboard case the value of the land taken as found by the Board of Appraisal was less than one-fifth of its market value as found by the jury.

The Seaboard could go into a court, however, where the rules of evidence are applied and save its property from being arbitrarily "confiscated" and secure a record on appeal in which the facts were not concealed.

The Seaboard was in a very different position from that in which appellant finds itself in the case at bar.

In the case at bar, appellant must submit to having its property "confiscated"—unless this court will look beyond the mere form of the judgment of the Court of Claims and correct the injustice done by reason of the failure of the Court of Claims to find the facts and apply the law by which the Supreme Court has declared the Court of Claims must be governed (*Globe Works* vs. *U. S.*, 53 Ct. Cls. 532).

In the case at bar the value of the property taken was found at a ridiculously low value—as in the Seaboard case. As is usual, however, the President fixed the amount so found as the "just compensation" to which the owner was entitled without interest, no matter when paid.

The Court of Claims "rubber stamped" the finding and rendered judgment for the unpaid balance of 25% of the amount so found without interest—thereby judicially making delay profitable to the Government and penalizing diligence.

If the Seaboard case had been tried in the Court of Claims and the rules of evidence and the decisions of this

court disregarded as they were in the case at bar, the Seaboard would have received $235.80, years after its property of the value of $6,000 had been taken by the United States under its sovereign power—and the facts would have been so concealed in the record on appeal under the shield of technical rules that the Appellate Court would never have been permitted to know the facts.

In the Seaboard case the opinion of the undivided court rendered by Mr. Justice Butler says:

> "Section 10 of the Lever Act authorized the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken. The United States, in effect, claims that the owner is entitled to no more than the value of the land as of date of taking, to be paid at a later time when ascertained. This suit is a part of the authorized procedure initiated by the United States for the condemnation of land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. The requirement that just compensation shall be paid is comprehensive and includes all elements and no specific words to include interest is necessary when interest or its equivalent is a part of such compensation. Where the U. S. condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the

value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, contemporaneous with the taking. Interest at a proper rate is good measure by which to ascertain the amount to be added. The legal rate of interest as established by the South Carolina statute was applied in this case.

"This was a palpable and reasonable method of perfecting the indispensable condition to the exercise of the right of eminent domain, namely: of making 'just compensation' for the land just as it stands at the time of taking. The addition of interest allowed by the United States Court is necessary in order that the owner shall not suffer loss and shall have just compensation to which he is entitled."

*If a railroad company is entitled to interest on the market value of property taken, as held in the Seaboard case, is there any reason why appellant should be placed outside the protection of the constitution?*

To do so would be to discriminate in favor of railroads and against appellant. That this court will not do, for it will not be a "respecter of person" but the protection guaranteed by the Constitution will be impartially applied in the case at bar, and this court will not permit the right to "just compensation" to be arbitrarily and unjustly taken from appellant.

Appellant is entitled in the case at bar on the record as certified to this court (meagre and unfair to appellant as it is) to judgment for the equivalent of interest on the declared market value of the tugs and barges from the time of taking until paid, together with the amount of the remaining unpaid 25% of declared market value.

The Court of Claims adjudged that the tugs and barges were commandeered August 3, 1917; that the tugs were actually taken possession of on October 12, 1917, and the barges October 18, 1917; that the tugs and barges were of the market value of $1,500,000; that 75% thereof, to wit $1,125,000 was paid appellant on December 29, 1917, leaving unpaid the balance of 25%, $375,000.

The tugs and barges were, in contemplation of law, taken at the time they were commandeered on August 3rd, 1917 and interest on their market value should be paid from that date if the "just compensation" provided by the Constitution is paid. After the property was commandeered appellant was deprived of their unrestricted use, although the Government might delay in taking physical possession.

Unless the Seaboard case and the case therein cited are overruled, appellant is entitled to be paid according to the facts found by the Court of Claims, interest at the legal rate of 6% per annum on the market value of the property taken from August 3rd, 1917 until paid.

The market value of the property found by the Court of Claims at the time of taking is $1,500,000.

On December 29th, 1917, 75% of that amount without interest was paid appellant, leaving due under the finding of the Court of Claims ..... $375,000

Interest on $1,500,000 at 6% from August 3rd, to December 29th, 1917 ..... 36,500

Interest on $375,000 from December 29th, 1917 to December 29th, 1925 ..... 170,000

Total amount due December 29th, 1925 under the facts as found by the Court of Claims as the law is construed in the Seaboard case ..... $581,500

Appellant is entitled to a judgment for that amount and interest in any event, it is respectfully submitted, unless this court is ready to reverse the well settled law as set forth in the Seaboard and other cases, and establish the principal that "rules of law" have been abrogated.

## POINT II.

**That the record on appeal "speak the truth" is a substantial right of appellant. The record in this case fails to do so and does not comply with the rules of the Supreme Court.**

The record herein is so meagre as to make it difficult for the court to determine wherein the Court of Claims denied appellant the protection to which it is entitled under the law.

The Court of Claims directed its clerk in making up the record to comply "with the rule in the Supreme Court."

It is respectfully submitted that if the record on appeal in this case complies "with the rule in the Supreme Court," then such rule is in conflict with the constitution of the United States, and this court will permit no rule to nullify the fundamental law by which the court itself was brought into being and exercises its functions.

The record on appeal as prepared under direction of the Court of Claims is so framed as to withhold from this court that which is essential to be before an appellate court to enable it to make an intelligent disposition of the case on appeal.

If in an appeal to this court the record can be made up in compliance "With the Rule in the Supreme Court"

so as to withhold the facts upon which the Court of Claims refused to apply the rules of evidence, then, it is respectfully submitted, this court will not by technicality of any sort permit its rules to be used as a pretext for overriding the fundamental law of the nation.

In the case at bar, defendant contends that by reason the "rule of the Supreme Court" as to the contents of the record of the case on appeal from the Court of Claims, that this court is powerless to protect the rights guaranteed appellant by the Constitution; that the record on appeal must be so made up and certified that the facts upon which the judgment of the Court of Claims is based shall be concealed from the appellate court; that whether the evidence in the record upon which the judgment should be based was competent or incompetent, relevant or irrelevant, cannot be brought to the attention of the appellate court; that technical rules for the guidance of clerks as to the form of the record of case on appeal estop this court from giving the protection that the Constitution guarantees.

This court will look through form to substance. The protection guaranteed by the fundamental law of the land is superior to any rule promulgated for direction of clerks—and this court will not subrogate substantial rights to technical forms, though the urge to do so comes from the Department of Justice.

In the Pacific railroad case that came before this court more than a quarter of a century ago, it was held by a divided court that the Sherman Anti-Trust law was binding in the exact words as embodied in the act of Congress; the court refused to write the word "unreasonable" before "restraint of trade" in the act.

Following this there was development of combinations to such an extent that practically every product and branch of business was more or less affected by the anti-trust law.

Construction of this law came before this court again in the Standard Oil and Tobacco cases—two combinations that by their ramifications have entered into the lives of the people of the nation.

Effort was again made to have the court write "unreasonable" restraint of trade. The court construed the law to relieve its "hard and fast" rule theretofore approved by the courts, by adopting the "rule of reason."

If there has been any case before this court in which the "rule of reason" should be invoked, the case at bar is such a case.

In his dissenting opinion Justice Harlan in the Standard Oil Case (221 U. S. 68) gives expression to principles of law that if applied in the case at bar, the judgment of the Court of Claims will not be affirmed:

> "The illustrious men who laid the foundations of our institutions deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of government than the provisions under which were distributed the powers of Government among three separate, equal and coordinate departments—legislative, executive, and judicial * * *. No department of that Government can constitutionally exercise the powers committed strictly to another and separate department * * *.
>
> Mr. Justice Bradley wisely said, when on this bench, 'that illegitimate and unconstitutional practices get their first footing by silent approaches and

> slight deviations from legal modes of legal procedure.' Boyd *v.* United States, 116 U. S. 616, 635. We shall do well to heed the warnings of that great jurist."

A Board of Appraisal comes under the administrative department and cannot exercise the functions of the judicial.

This court has applied the "rule of reason" in other cases and, it is respectfully submitted, that, if the precedents established by this court are adhered to, the judgment of the Court of Claims cannot be affirmed.

In the case of Standard Oil Company of New Jersey, petitioner, *vs.* Southern Pacific Company and James C. Davis, Director General of Railroads (265 U. S. 564), the court rendered a judgment which prevented the Standard Oil Company from receiving the same sort of treatment that appellant has been accorded in the case at bar. The "rule of reason" and the application of principles of common honesty were enforced. The facts in that case were given due consideration in accordance with established rules of evidence, and the constitutional right of the Standard Oil Company to be paid "just compensation" for private property taken for public use was given practical effect.

As in the Seaboard case, the opinion of the court was delivered by Mr. Justice Butler:

> "The petition to this court for a writ of certiorari alleges that at the time of the collision the *Proteus* was under the sole control of the Director General of Railroads * * *. After the expiration of the term of the Circuit Court of Appeals, peti-

tioner learned that a final settlement had been made between the Southern Pacific Company and the Director General by which the liability of the latter for the loss of the *Proteus* was satisfied by payment of $750,000 * * *. The petition was granted * * *. By leave of this court additional testimony relating to the settlement was taken * * *. There was no agreement as to the value of the *Proteus* * * *. No question of tort or negligence on the part of the Director General was involved * * *. In case of total loss of a vessel," (*and the same must be true where commandeered and taken*), "the measure of damages is its market value, if it has a market value, at the time of destruction * * *. Where there is no market value * * * other evidence is resorted to.

The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. Brooks-Scanlon Corporation *vs.* United States, 265 U. S. 106, 123. And by numerous decisions of this court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value. Southwestern Bell Telephone Co. *vs.* Public Service Commission, 262 U. S. 276, 287, and cases cited; Bluefield Co. *vs.* Public Service Commission, 262 U. S. 679, 689; Georgia Ry. & Power Co. *vs.* Railroad Commission, 262 U. S. 625, 629; Brooks-Scanlon Corporation *vs.* United States, *supra*, 125; Ohio Utilities Company *vs.* Public Utilities Commission, decided March 2, 1925, ..... U. S. ..... The same rule is applied in England. *In re* Mersey Docks and Admiralty Commissioners (1920), 3 K. B.

223; Toronto City Corporation *vs.* Toronto Railway Corporation (1925), A. C. 177, 191). It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. Minnesota Rate Cases, 230 U. S. 352, 434. * * *

The District Court found that in 1917 and 1918, on account of unprecedented demand and a shortage of shipbuilding facilities, the market value of ships was higher than the cost of construction; and also found that in 1918, when the *Proteus* was lost, the cost of construction was approaching the peak which came some months later. 285 Fed. 619, 620. Respondents called three witnesses experienced in shipbuilding and familiar with construction costs and value of ships in 1918. Each made an estimate of the cost of reproduction of the *Proteus* as of the date of the loss. Their estimates were respectively $1,755,450, $1,750,000 and $1,750,000. One of these witnesses and two others called by respondent testified respectively that in 1918 the value of the *Proteus* was $1,225,000, $1,297,637 and $1,350,000. * * *

In view of changed prices, the original cost of the vessel was not useful as a guide to her value when lost. * * *

It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.' And see City of Winona *vs.* Wisconsin-Minnesota Light & Power Co., 276 Fed. 996, 1003. * * *

The evidence requires a finding that, as of the date of her loss, the cost of reproduction new of the *Proteus* was not less than $1,750,000. * * *

In August, 1918, the immediate demand for ships was greater than the supply; the shipyards were working to full capacity; wages and prices were high; the trend of construction costs was upward, and the element of time was of the utmost importance. And witnesses on both sides testified that such conditions make for a lower rate of depreciation to be taken into account in determining value. If new, the *Proteus* would have been worth at least her cost of reproduction. Plainly, conditions in 1918 justified a smaller deduction from cost of reproduction new than before the war, and made value of a vessel in good condition and ready for use approach more nearly its value new. * * *

The value fixed by each of petitioner's witnesses is more than $1,000,000 less than the reproduction cost. The rate of depreciation taken by petitioner's mechanical engineer is too high in view of the conditions prevailing at the time of the loss. The other witnesses based their calculation on a reproduction cost that was too low. *Moreover, certain valuations made by the government board of appraisers of which they were members seriously impair the weight of their testimony.* In 1917, the United States requisitioned the Havana and the Saratoga, vessels of the same type as the *Proteus* and about one and a half times its size, and constructed in 1906. Cramps estimated reproduction cost of each in 1917 to be $3,000,000, about three times original cost. The board fixed value at $2,240,000 each, about 74 per cent. of reproduction cost. But the value of the *Proteus* as given by these witnesses was less than 38 per cent. of her cost of reproduction new. * * *

> We think the commissioner and district court failed to give due regard to construction costs, conditions, wages and prices affecting value in 1918; and that the evidence sustains the decree of the Circuit Court of Appeals."

If this court can go through the technical shield of the Board of Appraisal (behind which the Government retired) so as to prevent "confiscation" of the property of the Standard Oil Company, is there any reason why a different course should be adopted when the rights of the Luckenbach Steamship Company are involved?

If the evidence produced in the Court of Claims is given the same application as similar facts were given in the Standard Oil case, then this court cannot do otherwise, it is respectfully submitted, than render a judgment which will enable appellant to collect the market value of the tugs and barges taken by the Government at the time taken and interest until paid. The evidence shows this to be in excess of four million dollars.

It is not conceivable that this court will permit the Constitution to be so entangled in rules and red tape that the property of a citizen can be confiscated and the citizen denied an opportunity to have his rights adjudged in conformity with the guarantees of the Constitution—especially in view of the protection given the Standard Oil Company.

## POINT III.

**"Just compensation" must be determined by competent evidence and courts have no right to abrogate their judicial functions and shift their responsibility to any board or other agency.**

> "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation should be, or to prescribe any binding rule in that regard." Monongahela Navigation Co. *vs.* U. S., 148 U. S. 312-317.

The Court of Claims in this case specifically states that it has abandoned its judicial function and passed to the Board of Appraisal the responsibility of determining the "just compensation" to which appellant is entitled.

The court says of the evidence presented in the Court

> "Much of the evidence submitted is wholly irrelevant and does not concern the value of the tugs and barges at the time they were taken; the expert evidence is vague and indefinite, and is largely if, not altogether, speculative and conjectural" (R., 10).

In explanation of the abandonment of its judicial function and the adoption of the finding of the Board of Appraisal, the court says:

> "The valuation placed on the tugs and barges of plaintiff by the Board of Appraisal is a fair one, and that the compensation awarded by the president is just." The Board of Appraisal made an exhaustive examination of these tugs and barges at the same

> time, or just before, they were taken and the valuation set by the board is fair and liberal (R. 10).

This is a concise and unequivocal statement by the court that it refuses to accept and meet the responsibility laid on it by the law to determine from the competent evidence offered in the Court of Claims, the "just compensation" that appellant is entitled to receive.

The court cannot legally shift this responsibility to the Board of Appraisal or the President.

If the court's designation of the evidence is limited in its application to that of defendant it is correct; the so-called expert evidence offered by defendant is "vague and indefinite and largely, if not altogether speculative and conjectural."

The court must base its judgment on evidence produced in court, and when it refuses to make evidence the basis of its judgment (as it plainly states it did in the case at bar) it ceases to perform the functions of a court and its decision is used to give dignity and force to the finding of an administrative board of another department of the Government which came to its conclusion from unknown information, misinformation or prejudice.

*There is no evidence in the record sustaining the judgment.*

We have the authority of the Court of Claims that its judgment was based on the findings of the Board of Appraisal—and yet the opinion contains the misleading inference that the conclusion reached was "upon a careful review of *all* the evidence"—competent and incompetent.

## Rules of Evidence Control.

The rules of evidence control the trial of cases in this Court. Mr. Justice Downey so held in *Globe Works* v. *United States* (53 Ct. Cls., 532):

> "The Supreme Court has said that the rules of evidence as deducted from the common law shall govern in this court and this court has so held."

In the same case the learned Justice amplifies and emphasizes the controlling force of the rules in evidence in the Court of Claims:

> "The primary question which presents itself is one of evidence, and the *competency* as evidence of the matter relied on as such. It should not be necessary to say, and but for that which is sometimes asked of us, we would not say, that a plaintiff seeking relief at the hands of this court must assume the burden of proof as in any other court of original jurisdiction, and if he successfully assumes that burden *it must be by competent evidence.* * * * *Right must be determined from competent evidence, and if the party upon whom the burden rests fails in that respect, he must fail in his remedy.*"

Much of the evidence offered by defendant justifies the assumption that counsel for defendant assumes that the statement of the Court that "*right must be determined from competent evidence*" applies exclusively to appellant, and that because the defendant is the Government, the rules of evidence have no application to proof offered by it; that "the king (sovereign) can do no wrong."

The inelegant, but expressive, old saw, that "what is sauce for the goose is sauce for the gander," is especially applicable to this contention of the defendant.

Appellant does not desire that violence be done in its favor to the well-settled rules of evidence, and it must respectfully insist that the defendant shall be required to make its proof in accordance with, and subject to, the same rules.

## Conclusive Force of Facts Found.

The conclusive force given by the Supreme Court to facts found by this Court justifies appellant in insisting on an impartial application of the rules of evidence to proof offered by defendant as well as to that offered by appellant.

In delivering the opinion of the Court in *Brothers* v. *United States* (252 U. S. 88, at page 93), Justice Pitney said:

> "For the purpose of our review, the findings of the Court of Claims are to be treated like the verdict of a jury, and this court is not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling or modifying its scope."

In *Delaware and Lackawanna Railroad* v. *United States* (54 Ct. Clms., 35, at p. 42), Chief Justice Campbell says:

> "It should be recognized that the conclusiveness accorded by the rules and the decisions of the Supreme Court to the findings of this court (they being in the nature of special verdicts), places a grave responsibility upon this court, and upon parties as well, to have evidence in the record upon which to base them."

It is respectfully submitted that equal responsibility rests upon the Court to exclude from the record patently and unmistakably incompetent and irrelevant evidence calculated, whether intended or not, to mislead the Court and prejudice the rights of appellant.

There appears in the record a persistent padding with testimony so irrelevant and incompetent that it amounts to a serious injustice to appellant, and unless corrected by the Court, reduces the trial of the action to a contest in which bulk is substituted for evidence and confusion for clarity.

This incompetent and irrelevant testimony is offered by the defendant for a purpose. The tendency of the same must be to confuse and mislead with the hope that the Court will arrive at a different conclusion and render a different judgment with this incompetent testimony in the record than would be rendered if the Court has before it only competent and relevant testimony.

The introduction of this utterly incompetent testimony leads to the conclusion that counsel for the defendant are proceeding upon the mistaken theory that the Court of Claims is only a department of the Government, instead of being a court with profound respect for the constitution of the nation, applying with impartiality the rules of evidence by which causes are, and of right should be, tried and determined by this Court.

If appellant had been satisfied with the compensation found by the Board of Appraisal and *pro forma* fixed by the President it would have accepted the same and no suit would have been brought. Not being satisfied, however, it took action in the Court of Claims to enforce its rights guaranteed by the Constitution.

## POINT IV.

**The competent evidence in the record does not support the findings of fact or the conclusion of law of the Court of Claims.**

If the rules of evidence as deduced from the common law govern in this court, the findings of the Board of Appraisal will be excluded from consideration by the court in its findings of fact and its conclusion of law.

Incompetent evidence will not be permitted to be used as a basis for expert evidence, and the one upon whom the burden rests will fail in his remedy if he relies upon such evidence. If the incompetent evidence is excluded and the "just compensation" guaranteed by the constitution determined on the competent evidence only and the precedent set by this Court in favor of the Standard Oil Company (265 U. S. 564) is applied in this case, the court will find the value of the five tugs and twelve barges taken at more than Four Million ($4,000,000) Dollars at the time they were taken.

### What Property Was Taken.

It is undisputed that a fleet of five steam tugs and twelve barges were taken from appellant by defendant. What were these tugs and barges; what was their construction, age, equipment and condition at the time they were taken are questions which the Court must first ascertain as a basis upon which to determine "just compensation."

How can these facts be ascertained? Is there any trustworthy basis in the record which the Court may use as a standard by which to determine the value of the property

taken and the just compensation to which appellant is entitled?

**Surveys Made by the Navy Furnish a Reliable Basis.**

Appellant offered in evidence report of a survey of each tug and barge made by the Navy shortly before the same were physically taken possession of, and report of a resurvey of each made immediately after the tugs and barges were taken physical possession of by the defendant. (Pages 46-136.)

These surveys were offered in evidence by appellant:

> "To show the condition, adaptability and suitability of the tugs and barges as an element to be taken into account in arriving at a basis upon which the value of said tugs and barges at the time they were acquired by the Government is to be determined (p. 46)."

These surveys were made by the Navy and were used as a basis upon which to deal physically with the tugs and barges taken, and upon which offer of settlement was made to appellant. Appellant accepts the surveys (except as to value) and asserts that they evidence an honest and intelligent effort made in the orderly performance of duty by men selected by the Navy to ascertain the construction and condition of the tugs and barges at the time they were commandeered by the Government.

It is made perfectly clear by the testimony of Captain Gillmor that the Joint Merchant Vessel Board had nothing to do with or jurisdiction over the matter of determining the reasonable and fair value of a vessel which had been taken over or was contemplated to be taken over by the Navy. (Q. 270.)

When these surveys were offered in evidence by appellant, it was stated:

> "The fact that Naval Officers are eminently qualified to ascertain the physical condition of tugs and barges is recognized, but the duty of such officers does not require that they shall be posted as to the commercial value thereof, however familiar they may be with the cost of material and of construction."

There could be no more convincing evidence of this statement than the fact that the surveys offered in evidence and signed by the Joint Army & Navy Merchant Vessel Board embody and adopt the estimate of values found by the Naval District Section, and is the basis upon which reports were made to the Navy Department, and said survey is the basis upon which the Secretary of the Navy finds the value of the tugs and barges, and upon which compensation was fixed by the Board of Appraisal for the acquisition of said tugs and barges.

## Value Found by the Navy.

The attention of the Court is, therefore, called to the estimate as to value by the Joint Merchant Vessel Board, and the value as a basis for compensation as fixed by the Naval Board of Appraisal and accepted by the Secretary of the Navy upon which settlement for 75% of the same has been made with appellant.

| Tugs | | Value in Survey | Value by Board of Appraisal and Accepted by Secretary of the Navy |
|---|---|---|---|
| No. 1 | (Exhibit 1) | $ 75,000.00 | $ 245,455.00 |
| " 2 | (Exhibit 2) | 100,000.00 | 136,364.00 |
| " 3 | (Exhibit 3) | 150,000.00 | 245,455.00 |
| " 4 | (Exhibit 4) | 180,000.00 | 272,727.00 |
| " 5 | (Exhibit 5) | 100,000.00 | 184,091.00 |
| | | $605,000.00 | $1,084,092.00 |

| Barges | | Dead Weight | Value Survey | Per Ton | Value Bd Appraisal | Per Ton |
|---|---|---|---|---|---|---|
| Babcock | (Exhibit 6) | 3,350 | 75,000.00 | 22.00 | 45,000.00 | 13.00 |
| Walker | (Exhibit 7) | 3,300 | 20,000.00 | 6.00 | 38,181.00 | 12.00 |
| Seneca | (Exhibit 8) | 3,800 | 100,000.00 | 26.00 | 68,182.00 | 18.00 |
| Carrie Clark | (Exhibit 9) | 1,850 | 25,000.00 | 13.00 | 20,455.00 | 11.00 |
| General Knox | (Exhibit 10) | 2,450 | 60,000.00 | 24.00 | 32,727.00 | 13.00 |
| Washington | (Exhibit 11) | 2,650 | 50,000.00 | 18.00 | 32,727.00 | 12.00 |
| Old Dominion | (Exhibit 12) | 1,870 | 35,000.00 | 18.00 | 47,727.00 | 13.00 |
| Josephus | (Exhibit 13) | 2,200 | 25,000.00 | 11.00 | 27,273.00 | 12.00 |
| San Joaquin | (Exhibit 14) | 2,400 | 15,000.00 | 6.00 | 21,818.00 | 9.00 |
| Sargent | (Exhibit 15) | 2,450 | 20,000.00 | 8.00 | 27,273.00 | 11.00 |
| Solitaire | (Exhibit 16) | 2,300 | 25,000.00 | 10.00 | 30,000.00 | 13.00 |
| West Point | (Exhibit 17) | 1,870 | 10,000.00 | 5.00 | 24,545.00 | 13.00 |
| | Barges— | 35,545 | 460,000.00 | | 415,908.00 | |
| | Tugs— | | 605,000.00 | | 1,084,092.00 | |
| | Total of the Fleet— | | 1,065,000.00 | | 1,500,000.00 | |

Instead of attacking the work of the Navy in making survey of these tugs and barges, appellant accepts same as a reliable basis from which the Court may find the facts as to the construction and condition of the tugs and barges when commandeered. The Court may assume that these surveys honestly and accurately describe the tugs and barges as they were at the time they were commandeered and taken by the Government. If these surveys are to be attacked and the action of the Navy assailed and repudiated, the defendant must assume the responsibility for doing so, for appellant will not.

## How the Surveys Were Made.

The surveys of the five tugs and twelve barges were made by men selected by the Navy to perform their duty because of their recognized capacity, training and fitness.

Captain Horatio G. Gillmor, a witness for defendant, is a Naval Officer and a member of the Joint Army & Navy Vessel Board who acted as a member of such board and signed the report of the surveys appearing in the record of the five tugs and twelve barges. He is the only member of the board who signed and reported these surveys who was offered as a witness by defendant. He has been active in behalf of the defendant in the trial of this case, and is perfectly familiar with the method pursued in obtaining the information, making the surveys and preparing the reports of the surveys. He describes in his testimony the method pursued to secure the information to make these surveys a complete and reliable basis upon which to deal physically with the tugs and barges, and as furnishing the necessary facts upon which the Court may ascertain the construction and condition of the tugs and barges when taken so that their market value may be determined as a basis upon which "just compensation" may be decreed.

## Evidence Offered by Defendant to Discredit the Navy.

The defendant offered a large number of witnesses for the evident purpose of discrediting the Navy and to show that the surveys made by it were not worthy of consideration by the Court. Among other witnesses offered for that purpose were many who were connected with the Navy in

various positions. *Not one of the men selected by the Navy who actually inspected these tugs and barges, whose duty it was to ascertain and report their construction and condition, was offered as a witness.* Only one member of the board who signed these surveys was offered as a witness—although most of those who actually inspected and who made report could have been produced by defendant. It is assumed that *if it had been desirable to give the Court the facts* as to the condition of this private property taken for public use, instead of presenting a distorted picture by cooks, shoe salesmen, carpenters, chauffeurs, movie actors, and others, after the tugs and barges had been taken over by defendant, repaired, changed and used, the men who were officially designated and who actually inspected and surveyed these tugs and barges would have been offered as witnesses.

## Naval Survey the Best Evidence.

Analysis of evidence offered by defendant that assails and seeks to discredit the surveys made by the Navy offered in evidence by claimant, must convince the court that the surveys furnished the *only* evidence in the case upon which it can safely rely to determine what was commandeered and taken.

It is respectfully submitted that the overwhelming weight of the evidence substantiates the surveys made by the Navy and the court cannot fail to find that these surveys are *the best evidence* as to the five tugs and twelve barges taken by the Government; that they furnish reliable and trustworthy evidence as to the construction, age and

condition of the tugs and barges at the time they were commandeered and taken.

To find that these surveys were not reliable and that the court must reject them and rely upon the vagrant recollection of cooks, sailors, movie artists, salesmen, naval attaches, and other witnesses produced by the defendant, as to the condition of the tugs and barges, has the effect of repudiating and discrediting surveys made by men specially assigned by the Navy for that duty. To do so would be a judicial finding of incompetency or corruption that is not justified by the evidence in this case.

It is unthinkable that the Court would be asked by the Department of Justice to make such a finding upon evidence so flimsy, uncertain and disconnected as that offered in behalf of the defendant herein to discredit and repudiate surveys made by the Navy and used as a basis upon which to deal with these tugs and barges, both for the use of the Government and as the basis upon which to arrive at a figure for settlement as "just compensation."

Appellant submits that the court cannot do otherwise than accept the surveys as the *best evidence* as to what was taken for which "*just compensation*" must be made.

## Market Value the Measure of Compensation.

Just compensation is the reasonable market value of the steam tugs and barges at the time they were commandeered and taken from appellant by defendant and interest thereon until paid. The tugs and barges were commandeered August 3rd, 1917, actually taken October 12th and 18th, 1917, and a Bill of Sale executed therefor on the 27th day of October, 1917.

At that time the country was at war, and the production

and sale of tugs and barges, as well as the material necessary to construct them, were in the hands of, or under the complete control of the Government, and the demand for means of water transportation was far in excess of the supply. The price of material and the cost of labor made the construction of the means of water transportation very expensive, if it was possible to secure the material and labor necessary to construct them. This was demonstrated by the high cost, at that period, of boats, tugs and barges built by the Emergency Fleet Corporation under the control of the Shipping Board (*Standard Oil* vs. *So. Pac. and Davis*, 265 U. S. 564).

The demand for means of water transportation at and following the period that these tugs and barges were commandeered was so great, and the rate of freight so high, that the earning power of tugs, barges and boats was such that they would pay for the cost of construction, in many instances, in one round trip. The tugs, barges and boats registered under the flags of other countries, which were sold and traded in on the markets of this country, tend to establish a "measuring rod" by which the reasonable market value of the tugs and barges embraced in this action may be satisfactorily ascertained.

"Just compensation" is the reasonable market value of the private property taken by the Government.

Three factors, it is respectfully submitted, may safely be taken into consideration in determining what is the reasonable market value of the private property taken by the Government, to wit:

(a) The price which might reasonably be presumed would be agreed upon between a willing buyer and a willing seller;

(b) The cost of reproducing tugs and barges of similar character at the period when those involved in this action were commandeered by the Government, upon the basis of the cost of labor and material at that time, with the added value of immediate possession with the consequent added earning power, surcharged with reasonable discount by virtue of the age and condition of the steam tugs and barges, presents a basis for ascertaining the "just compensation" to be paid appellant to which the court may well give serious consideration;

(c) The earning power of the steam tugs and barges at and following the period when the same were commandeered by the Government, taking into account the freight charges at that period and following, is an element upon which the reasonable market value may well be based which should not be overlooked or minimized in ascertaining what is "just compensation."

> "The plaintiff is entitled to the value of the plant *at the time it was taken.*" *Pacific Coast Construction Co.* vs. *U. S.*, 53 Ct. Cls. 582 (at p. 590).
>
> "Where private property is taken for public use and there is a market price prevailing at the time and place of taking, that price is just compensation." *Vogelstein* vs. *United States*, 262 U. S. 337; *New River Colliery Co.* vs. *U. S.* 262 U. S. 341- ? ??
>
> "The general rule is, of course, when one is entitled in any form of action to compensation based on the value of the property, the measure of recovery, when such property can be procured in the market, is the value of it in the market and not the cost." *Blake* vs. *U. S.*, 275 Fed. 861 (p. 863).
>
> "Just Compensation" is fair market value. *Nat. City Bank* vs. *U. S.*, 275 Fed. 855.

*Prince Line, Ltd.* vs. *U. S.* (tried before Judge Chatfield, Aug. 23, 1922, who delivered opinion on "reasonable market value"), 283 Fed. 535.

"It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. * * * If the highly important element of present cost is wholly disregarded such a forecast becomes impossible." *Missouri ex rel. Southwestern Bell Telephone Co.* vs. *Public Service Commission of Mo.*, U. S. Supreme Court, May 21, 1923, opinion by McReynolds, Justice.

**The Good Will of a Going Concern Has Market Value.**

The evidence before the Court of Claims shows that the five tugs and twelve barges taken as separate entities were of the value of more than Four Million Dollars. The fleet as a whole and the business which the fleet did, had a substantial value that appellant is entitled to be compensated for.

The tugs and barges were of large size and of far superior class from the average tugs and barges that were being used in transportation on the Atlantic coast.

The evidence shows that the fleet was taken as a whole and the business of the Luckenbach Steamship Company, which took years to build up, was destroyed when its tugs and barges were taken by the defendant. It is entitled to receive compensation for its good will and its established business.

The court's attention is directed to the statement of the Luckenbach Steamship Company made by its president, and appearing in the record of evidence in the Court of Claims on page 1013 &c., which gives in detail facts and figures

from which the market value of the business as a going concern may be determined.

Defendant laboriously argues that this business was in no sense a monopoly and thereby supplements the contention of appellant that it is entitled to be compensated for the market value of its business taken and destroyed. There being no monopoly, the element of good will entered into determining the market value of the property taken—a part of which was good will and an established business.

The case of the *Consolidated Gas Company of New York* vs. *Wilcox*, (157 Fed. 849, and affirmed by the Supreme Court in 212 U. S. 19) was the so-called 80 cent gas case. The rate was claimed to be confiscatory on the basis that the good will of the company was not taken into account. The elements of good will entering into the value of the property was fully discussed by Judge Hough, delivering the opinion of the court.

In delivering the opinion of the Supreme Court on appeal Mr. Justice Peckham (212 U. S., p. 19, at p. 12) said:

> "The complainant has a monopoly in fact and a consumer must take gas from it or go without. He will resort to the old stand because he cannot get gas anywhere else."

The syllabus at page 22 says:

> "Where a public service corporation has a monopoly, such as supplying gas in a large city, good will cannot be considered as an element of value of property employed."

In the Prince Line, Ltd. (283 Fed. 535) in deciding the question as to "just compensation" for pier requisitioned by the United States under the Lever Act, August 10th,

1917, held that a fair value was "in accordance with the law of supply and demand at the time of the taking." Writ of error in this action was dismissed (263 U. S. 727). To the same effect is the case of U. S. *vs.* Benedict (280 Fed. 76), which is affirmed in 261 U. S. 294.

In the case of New York Telephone Co. *vs.* Prendergast, 300 Fed. 822, at page 826, the court composed of Justices Hough, Knox and Winslow, in a *per curiam* opinion, in discussing the findings of the commission and illustrating when good will is taken into consideration in fixing the value of property, says:

> "A garment is made out of cloth and silk, buttons and thread, and by labor; but when completed and well made, its value is more than the aggregate cost of the item."
>
> "It is a going concern and as such has going values."
>
> "It is found that this plaintiff (the New York Telephone Co.) was created and does function very well; therefore it has going values because it goes well. The amount may be difficult of ascertainment, but that going value exists is self evident."

## Expert or Opinion Evidence Competent as to Market Value.

The Court having determined what has been taken for which "just compensation" must be made, the evidence of expert witnesses is competent for the purpose of enlightening the Court as to the reasonable market value of the private property taken.

> "Testimony in the shape of inferences or conclusions rests always on certain premises of fact.

* * * These premises, a consideration of which is essential to the formation of the conclusion or opinion, must somehow be supplied by testimony. * * * If * * * a witness is put forward to testify to the conclusion, the premises considered by him must be expressly stated, as the basis of his conclusion; otherwise, since his conclusion rests for its validity upon a consideration of the premises, and since the tribunal may later decide that certain premises are not proved and may thus reject them, it must, before accepting his conclusion, have the means of knowing whether it is based on a consideration of premises accepted as true by the tribunal. If these premises are not made to accompany the conclusion, the tribunal might be accepting a conclusion for which the witness had considered premises found by the tribunal not to be true; hence the premises must be stated hypothetically in connection with the conclusion; then, by other testimony, the material for determining the truth of the assumed premises may be furnished to the tribunal.

The key to the situation, in short, is that there may be two distinct subjects of testimony—premises, and inferences, or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, i. e., of distinguishing conclusions properly founded from conclusions improperly founded. That this is the orthodox and accepted theory of the hypothetical question in our law may be gathered from the following (the author cites numerous cases sustaining the text). *Wigmore on Evidence,* Section 672."

## Evidence of Appellant's Expert Witnesses.

Appellant offered as expert witnesses those possessing skill beyond that of a jury, and it desires to emphasize to the Court the contrast in this respect between the experts offered by appellant and the witnesses offered by defendant as to their possession of skill.

Appellant offered in evidence the surveys made by the Navy, and its expert witnesses were examined on the basis of the facts set forth in said surveys. There is, therefore, no question as to the basis upon which appellant's witnesses were examined and upon which their opinions are based, and it is respectfully submitted that the Court cannot do otherwise than accept the surveys made by the Navy.

None of the witnesses appellant offered as expert or opinion witnesses were employed by or connected with it in any way. Every expert witness offered by it was an expert in fact, whose experience, knowledge and training entitled him to express opinion upon which the Court can rely.

The basis upon which the expert witnesses offered by appellant gave opinion were the surveys made by the Navy. Appellant met the "rules of evidence deduced from the common law" (*Globe Works* vs. *U. S.*, 53 Ct. Cls., p. 535) which the Supreme Court has said should govern in the Court of Claims and which Court has so held.

## Basis Not Proven for Opinion of Alleged Experts on the Defendant's Hypothetical Questions.

Finding that it cannot afford to ask the Court to disregard the testimony of the appellant's qualified expert witnesses, based on the Navy's survey, and recognizing the fact that the Court cannot afford to accept the evidence of defendant's witnesses in refutation of appellant's case so clearly made out, defendant attempts to set up a new basis for opinion evidence.

The alleged facts embraced in the hypothetical questions asked by defendant are not proven, and what purports to be the description of the tugs and barges is so vague and meagre as to make it impossible for a witness to give a dependable opinion on such data, even if the evidence of the alleged facts embraced therein were competent and trustworthy.

## What Was the Value of Tugs and Barges When Commandeered.

The evidence is the only basis from which the Court can ascertain value and determine "just compensation". In the words of Mr. Justice Downey, "it should not be necessary to say that *competent evidence*" is the only evidence that this court will consider, and "if the party upon whom the burden rests fails in that respect, he must fail in his remedy."

It is proven by *competent evidence*:

That the five tugs and twelve barges were commandeered and taken from appellant by defendant:

That the Navy Survey furnishes the best evidence of the construction and condition of the tug and barges when taken, and makes a reliable basis for expert or opinion evidence as to the value of the private property taken for public use.

The Court must determine the "just compensation" to which appellant is entitled by the weight of the *competent evidence.*

## Only Expert Evidence Based on Navy Survey Competent.

The only evidence upon which the Court can consider (under the rules of evidence by which this Court is governed), is that based on the Navy Survey, because that is the *only competent* evidence of the construction and condition of the tugs and barges before the Court at the time they were taken.

Appellant offers nine expert witnesses, qualified by training and experience, to give *expert* evidence. They have under oath given their opinion, based on the Navy Survey. Not one of these witnesses is in any way connected with appellant, or directly or indirectly interested in the outcome of this action. Each of them occupies a position in the business world that furnishes a guaranty that the Court may rely on his opinion. His intelligent judgment is based on his knowledge of the market value of the tugs and barges at the time they were commandeered and taken and on the condition of the tugs and barges as shown by the survey made by the Navy.

The evidence shows that at and immediately following the time these tugs and barges were taken from appellant

that such tugs were making $500. a day, and that $5. per ton was being paid for freight from one point to another along the Atlantic Coast.

The returns from hauling freight equal to the "dead weight" tonnage of the barge *Babcock, Walker* or *Seneca* at $5 per dead weight ton, would have paid the value of one of the barges (average) as fixed by defendant's witnesses.

According to the opinion evidence (average) of defendant's witnesses, based on the Navy Survey, the entire value of the fleet of five tugs and twelve barges would have been paid by hauling 129,370 tons of freight (less than four times the aggregate dead weight tonnage of the barges), from one point to another along the Atlantic Coast.

## POINT V.

**"Due process of law" requires that the law be applied with impartiality even though the defendant is the sovereign and permits itself to be sued by one of its citizens.**

When one citizen proceeds against another in the courts of the United States, he has the full protection of the Constitution. The Fifth Amendment guarantees him the right of "due process of law" and provides a "rule of action" by which the rights of parties are adjudged.

The courts do not refuse to apply the rules of evidence as deduced from the common law when the contest is between individuals or private corporations.

Why make an exception when the Government is a party?

Parties have the right to insist that the competency or

incompetency of evidence be determined by the court, and that they be permitted to cross examine witnesses.

The primary question presented in the trial of actions and recognized in courts that respect the constitution and the rights of the citizen, is one of evidence and a party seeking relief at the hands of a court must assume the burden of proof and if he successfully assumes that burden, it must be by competent evidence.

Unless there is some tribunal which hears and determines the competency and relevancy of evidence, then the party denied such hearing is denied his constitutional right of "due process of law."

If his property is taken by a judgment rendered by a court which refuses to hear and determine whether the evidence to which he objects is competent or incompetent, relevant or irrelevant, then his property is taken from him as much by force as if he were held up on the high seas by pirates or was made to "stand and deliver" by outlaws on land—however high the character and learned may be the judicial instrument through which he is deprived of his property. If the Court of Claims will not determine whether evidence is competent or incompetent, relevant or irrelevant, then, it is respectfully submitted, that the only remedy appellant has is to appeal to this Court to apply the law to the facts shown by the evidence.

In the case at bar the evidence in the record has never been passed on by the Court of Claims, and awaits the decision of this Court.

The members of the Court of Claims are men of integrity and learning and they expressly affirm that the judgment is not based on the evidence but is based on the finding

of the Board of Appraisal and that the members of the court are not responsible for the judgment rendered. (R., 10, Memorandum.)

Appellant made every possible effort to have the court, at some time, in some place and in some way, determine and segregate the incompetent and irrelevant testimony from the competent and relevant—but without success.

The Court of Claims refused to decide the case on the competent evidence.

A citizen is compelled to proceed against his government in a court established by the government and authorized to determine his rights according to the prescribed rules of law. He has to appear before the court provided for that purpose and the Court of Claims has delegated the function of taking testimony to commissioners, and the function of determining the value of the property taken and the "just compensation" to which appellant is entitled has been assigned to the Board of Appraisal.

The record in the case at bar is encumbered with incompetent evidence that beclouds the issue and appellant is not permitted to know whether the court has excluded from its consideration this incompetent evidence. The court specially says, however, that it has made no distinction between competent and incompetent evidence. (R., 10.)

The judgment of the Court of Claims clearly demonstrates the fact that it has not confined itself to competent testimony; but says in so many words that its judgment is based on the finding of the Board of Appraisal. Consequently it makes no practical difference whether or not the court so much as read the record—for the evidence was not the basis of its judgment.

Appellant's property has been taken by the Government and unless the courts make practical application of the fundamental law to this case, and the property taken and the amount of "just compensation" to which appellant is entitled, is determined in accordance with "due process of law" its property has been taken in violation of the law which the Government has proclaimed for the guidance of its citizens.

It is respectfully submitted to this court that the Government has given the citizen the right to bring suit in certain courts by it designated for the recovery of "just compensation" of property taken by the Government and that it will not use its power to confiscate the property of its citizens from whom it demands respect and loyalty.

To give the citizens opportunity to sue the Government in its courts and then to refuse to apply the rules of evidence that this court says shall apply would be "making the promise to the ear and breaking it to the hope."

> "And one of you say unto them, depart in peace, be ye warmed and filled; notwithstanding ye gave them not those things which are needful to the body: what doth it profit?"—Bible, James, 2 Chap., 16 Verse.

For defendant to ask the Court to find that the mandate of the Constitution that "private property shall not be taken for public use without just compensation" is complied with by making such figures as defendant asks the Court to accept as the basis for determining "just compensation" would be equivalent to asking the Court to determine that "just compensation" and "confiscation" mean the same thing.

Appellant asks (and it has the right to demand) that the Constitution shall not be overridden, but that "just compensation" shall be paid it by defendant, and that the facts shall be ascertained from competent evidence, and the law declared and applied according to the rules of evidence. As Justice Downey has said—"it would not be necessary to say this" (53 Ct. Cls. 532), but for the fact that this record is padded by defendant with irrelevant and incompetent evidence which is calculated to weary the Court and thereby work injustice to appellant.

## POINT VI.

**Appellant entitled to judgment for value of property taken and interest.**

Appellant respectfully submits that upon the competent evidence in this case, appellant is entitled to have found that the fleet of five tugs and twelve barges taken from appellant by defendant was of the value, at the time commandeered, of at least $4,770,000., and that as a conclusion of law appellant is entitled to recover of the defendant the sum of Three million six hundred and forty-five thousand ($3,645,000.) Dollars, with interest thereon from the 3rd day of August, 1917, together with interest on the sum of $1,125,000. from the 3rd day of August, 1917, to the 29th day of December, 1917.

PETER S. CARTER,
C. C. DANIELS,
Attorneys for Appellant.

FILED
MAR 10 1926
WM. R. STANSBURY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 32

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

*v.*

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

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## REPLY BRIEF FOR APPELLANT.

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The brief filed herein in the name of the United States demonstrates the astuteness of the able Solicitor General and his associates. This court is asked to strike from the files appellants' brief and to close its eyes and refuse to consider all of the questions presented by the record with the single exception of the question whether or not appellant is entitled to interest on the amount adjudged as the value of the property at the time taken.

It is an old trick of the artful lawyer to ignore facts that can not be met and to decline to recognize the law that is authority for the position of his opponent.

Defendant's brief shows those who drew it are past masters in the art of "making the worse appear the better reason" and are fully cognizant of the fact that if this court considers the issues involved in the appeal the judgment of the Court of Claims can not be affirmed—without doing violence to the Constitution which this court is jealous to preserve—consequently the insistance that the truth be withheld from this court.

The rule that the sovereign is immune to action by the citizen without its consent is one so obviously supported by every consideration of public policy that it is never challenged.

The rules of procedure for ascertaining the extent of damage suffered by the citizen at the hands of the sovereign in the exercise of its absolute authority, and the granting of relief to the citizen incident to the exercise of the authority, clearly arise from the dictates of justice and good faith.

It cannot be doubted that the very consideration that caused the sovereign to waive, under certain conditions, its immunity from suit by the citizen necessarily implies the further waiver of technical and far-fetched defenses by the sovereign against claims thus permitted to be asserted.

In other words, when the sovereign consents in the cause of justice to be sued at all, there is inherent in the permission a guaranty that unconscionable technical defenses shall not be interposed.

## I.

**Vituperation will not take the place of argument and denunciation cannot be effectually substituted for logic.**

With the evident purpose of prejudicing this court against appellant, hoping thereby to prevent consideration of the issues in the appeal, vituperation is substituted for argument and denunciation for logic. Defendant's brief (p. 9) under the misleading title of "ARGUMENT" says:

> "If this case were to receive the treatment it deserves, the appellant's brief would be stricken from the file and the appeal dismissed. There is but one point made in the brief worthy of discussion, and that relates to the question of interest as a part of just compensation. The greater part of the fifty pages of appellant's brief are devoted to incoherent railings at the Court of Claims, to distortions of the findings of that Court, to statements wholly unsupported by the record, to the discussion of evidence in disregard of the explicit rule that on an appeal from the Court of Claims this Court will consider only the findings, and to the assertion that the rule of this Court that the findings and not the evidence shall be included in the record certified by the Court of Claims is 'unconstitutional.' We will pass over this mass of irrelevant matter, to deal only with the points meriting discussion."

With equal courtesy and propriety defendant's brief may be thus characterized:

Defendant's brief discloses the deliberate intent to divert the attention of the court from the issues involved in

the appeal; to substitute technical hairsplitting for honest discussion of the merits; by arbitrary misrepresentation of facts and ingenius and false deductions, excuse the taking of private property for public use, deny the owner the "just compensation" guaranteed by the constitution, and deprive him of a forum in which his right to compensation can be heard and determined in accordance with the established rules necessary to preserve "due process of law"; to deliberately and unjustly seek "under the forms of law" to put the Government in the unenviable attitude of confiscating a citizen's property and escaping liability by technical subterfuge.

Appellant has been deprived of the protection of the Constitution. Defendant's contention that the rules adopted for the guidance of Clerks are superior to the Constitution and estop this court from going "through form to substance" is by no means complimentary to this court, it is respectfully submitted.

The guarantees of the Constitution have not lost their force. The constitutional form of government established by the fathers will not be exchanged for autocratic rule, controlled by personal opinion or mistaken ideas of duty to save the Government from payment for private property taken by sovereign power for public use. This court will not permit the rules of evidence developed out of the wisdom of experience to be thrown in the scrap heap. The long line of decisions make it clear that this court will not lend itself to such subversive and dangerous doctrines as advocated by defendant with Machiavellian sophistry.

## II.

**Unless this court overrules and repudiates the Seaboard case, appellant must recover the equivalent interest.**

Defendant graciously gives permission for this court to consider the question of interest.

The right of appellant to be paid the equivalent of interest is fully discussed in appellant's brief heretofore filed. In addition to what is therein said, we desire to call the attention of the court to certain statements made in defendant's brief and to point out some of the contentions therein contained.

Defendant contends that the tugs and barges taken from them were not commandeered under the act of Congress. This court is asked to believe that the officers who took this property, the Board of Appraisal, the Secretary of the Navy and the President, who certified that the same was commandeered under the specific act of Congress, did not know what they were saying and that the disbursing officers who paid appellant more than a million dollars on property commandeered and taken from appellant under authority of an Act of Congress, acted illegally and deserve censure, if not prosecution, for squandering public funds committed to them.

Defendant says, that the tugs and barges were purchased from appellant under contract entered into by appellant without knowledge, thus discrediting the intelligence of not only appellant but of the representatives of the Government. The statute that relieves the Government from payment of its interest is by this sophistry injected in the case. This discovery is entitled to rank with the discoveries of Dr. Cook of Arctic fame.

The Government, acting under the Act of Congress, commandeered and took from appellant its fleet consisting of five tugs and twelve barges; destroyed its prosperous business and acquired a perfect title to all of the tugs and barges constituting the fleet, full releases and conveyances were made by those who held any adverse interest in any of the tugs and barges and title confirmed and made perfect and thereupon the Government paid to appellant, the owner of the fleet, seventy-five per cent of the value of the fleet at the time of taking, as found by the Board of Appraisal. No question was raised as to ownership.

The judgment of the Court of Claims specifically finds that appellant was the owner of the fleet:

> "The Court, upon due consideration of the premises find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Three hundred and seventy-five thousand dollars ($375,000.00)" (R. 11).

This necessarily carried with it adjudication that appellant was the owner of the fleet and entitled to be paid by the Government their value including every tug and barge, at the time they were taken. Defendant did not appeal from this judgment and is estopped to deny ownership by appellant.

The position of defendant that this court shall only apply the Seaboard case when railroad companies profit by its application but its application shall be withheld when its application inures to the benefit of appellant, is to say the least, novel. The reason assigned by defendant for this novel position is that.

> "The ordinary machinery for the payment of Government obligations will not, as a practical matter, permit of such an application. The routine covering Government expenditures, the auditing of vouchers, the issuance of warrants, etc., makes it difficult and practically impossible to include interest up to the very moment that payment is actually made and if that strict view of the Seaboard Air Line Railway decision is to be accepted, there will hardly be a case in which the United States can pay just compensation."

The mere statement of this position is sufficient to demonstrate that defendant is pleading not for the impartial administration of the law but for such application of the decisions of this court as officials of the Government see fit to make—however much injustice and partiality may result therefrom.

The record shows that appellant has at no time had the opportunity to accept the value of the property at the time of taking as determined by the Government with interest on that amount up to the time of the opportunity. No amount of sophistry can overcome this fact. If this court is not ready to repudiate the Seaboard case then the judgment of the Court of Claims cannot be affirmed.

The jurisdiction of this court can be defeated only by distortion of the facts and by unwarranted application of technicalities. The Court of Claims duly allowed the appeal from this judgment. The appeal from the judgment was duly taken and is pending in this court, and this will be considered and determined in accordance with law and good conscience.

## III.

**The competency and relevancy of evidence are questions of law that appellant is entitled to have determined.**

If the Solicitor General and his associates do not distinguish between the competency and relevancy of evidence on the one hand and the weight of evidence on the other, appellant is not responsible and its counsel should not be charged with "railing" because they point out the difference.

Defendant contends that because of the consideration given to findings of the Court of Claims by this court, therefore all rules of evidence are abrogated and the hands of this court are tied so that it cannot consider whether there was any evidence to sustain the findings of fact made by the Court of Claims. Such a doctrine undermines the basic principles of law. If there was no evidence to sustain the findings of fact by the Court of Claims then appellant has a right under the law to have the facts found stricken from the record. If the findings of fact are based on incompetent evidence, then to that extent are the findings illegal and in conflict with the law as uniformly construed by this court. This is fully discussed in appellant's brief heretofore filed.

Appellant asks only that this court consider the questions raised by the appeal and when so considered, it is respectfully submitted, the judgment of the Court of Claims cannot be affirmed.

Respectfully submitted,

PETER S. CARTER,
C. C. DANIELS,
*Attorneys for Appellant.*

FILED
DEC 28 1926
WM. R. STANSBURY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1926.

No. 32.

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

## NOTICE AND PETITION FOR REHEARING

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IN THE

# Supreme Court of the United States

LUCKENBACH STEAMSHIP COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES.

*Sir*:

PLEASE TAKE NOTICE that upon the annexed Petition for Rehearing, sworn to on the 24th day of December, 1926, by R. C. THACKARA, Vice President of appellant above named, we shall move for a rehearing of the appeal which was herein granted, before the Supreme Court of the United States at the Capitol, City of Washington, District of Columbia, on Monday, January 10, 1927, at the opening of the Court on that day or as soon thereafter as counsel can be heard and that we shall then and there move for such further relief in the premises as may be just.

Dated, New York, December 24th, 1926.

Yours, etc.,

PETER S. CARTER,
C. C. DANIELS,
Attorneys for Appellant.

To:

THE ATTORNEY GENERAL OF THE UNITED STATES,
Washington, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 32.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

*vs.*

THE UNITED STATES.

## PETITION FOR REHEARING.

*To the Honorable Chief Justice and the Associate Justices of the United States Supreme Court.*

The appellant respectfully shows to the Court as follows:

This is an appeal from the Court of Claims decided by this Court on November 23, 1926, affirming the judgment, the opinion by Mr. Justice Van DeVanter.

It is perfectly clear that the position of appellant was misconceived by this Court. This is shown by the opinion:

> "The presentation of the case on behalf of the Claimant has proceeded on the assumption that our power to review is as broad as the power of the Court of Claims to hear and determine in the first instance."

Appellant's counsel has been unfortunate if it has presented the appeal in this case in such manner as to justify such a conclusion by this Court. The fact that such an impression exists in the minds of the Court, makes it imperative that the basis of this appeal be examined by the Court—if justice is more important than technical forms.

## I.

The Act of Congress of June 15, 1917 is the authority under which Claimant's tugs and barges were commandeered and taken. There is nothing in the act that confines the Court of Claims to consideration of the facts—but the court is required to consider questions of fact and apply the law to the facts—and it is bound by the law just as are other courts established by the Government.

This Act of Congress was passed to facilitate the necessary activities of the Government in conducting the war. It was never intended to be used as an instrument for confiscation. The constitutional right of the citizen whose property the Government takes for public use justifies the demand that he be protected by the law. It is only when those whose duty it is to administer or construe the law fail to safeguard the interest of the citizen and respect his constitutional rights that property is taken without making the "just compensation" that the Constitution guarantees.

Under the judgment rendered by the Court of Claims the property of Claimant, it is respectfully submitted, has been confiscated in violation of the law and in contempt of the plain mandate of the Constitution.

Claimant has not received "just compensation"—not even according to the facts found by the Court of Claims—which were based solely on the findings of the Board of Appraisal.

Claimant is entitled to have its right to "just compensation" determined by law—which has been understood to be a "rule of action", and not the mere opinion of employees of the Government whose ambition it seems to be to withhold from the citizen as large a portion of the value of property taken as possible.

## II.

The opinion (p. 6) says there is no showing that, "in conformity to the 5th rule before quoted, Claimant tendered ("twenty-seven additional findings" embraced in motion for new trial and request for amended findings) "and if that was not done the Claimant was not in position to press them."

Rule V quoted by the Court reads as follows:

> "In every such case, each party, at such time *before trial*, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

Request, in conformity with this rule, was tendered "*at such time before trial and in such form as the court prescribed.*"

The opinion also cites Act of Congress of February 13, 1925, as applicable to this action. The learned Justice

delivering the opinion was evidently not advertent to the fact that Claimant could not take advantage of the provisions of the act—which was evidently brought about because of injustice done by reason of the failure of the Court of Claims to find facts upon which an appellate court could intelligently review the judgments of the Court of Claims and apply the law applicable thereto.

The attention of the Court is called to the fact that this action was filed in the Court of Claims on May 6, 1918, and judgment of the Court of Claims filed April 28, 1924 and the appeal filed in this court November 18, 1924, all before the Act of Congress of 1925 cited in the opinion was passed.

The opinion is evidently based on the assumption that Claimant could, under the provisions of this act, demand that "the facts be specifically found," it became the duty of the Court "to make and enter special findings of fact as a part of its judgments," and that Claimant did not so request "at the time the case is submitted," a "party aggrieved by the judgment, not later than twenty days after its rendition", could "request the court in writing to find the facts specifically; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a part of its judgment," which "shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidences from which they are found."

If the Act of Congress of 1925 had been in force at the time this case was before the Court of Claims, this Claimant could have demanded that the facts be *specifically* found and made a part of the judgment for review.

Since the act was not in existence, Claimant took every means open to it to induce, persuade or force the Court of

Claims to determine the issues on the evidence in the record and *find the facts* upon which the law should be applied and the judgment based.

It is only just to the learned Justice delivering the opinion of the court to assume that it was by reason of his understanding that the Act of Congress of February 3, 1925 was at that time in force that Claimant could have forced the Court of Claims "*to find the facts specifically*" that it is affirmed that as this was "not done, and Claimant was not in a position to present"—request for specific findings of fact.

This act was passed long after the judgment of the Court of Claims was rendered and the case appealed to this Court. It was not in force and to permit it to be used to the injury of Claimant and provide an "escape" for an unjust judgment that confiscates Claimant's property is an injustice that this Court will not countenance, it is respectfully submitted.

## III.

Appellant assumes that:

1. This Court is more interested in seeing that the provision of the Constitution guaranteeing "just compensation" for private property taken, is of greater force than rules made by the Court of Claims for the guidance of clerks;

2. The Court of Claims is a Court and not an administrative department of the Government, and is bound by the rules of evidence by which Federal Courts are bound.

3. This court has the same power to review the judgments of the Court of Claims that it has to review the judgments of the United States Circuit Court of Appeals; that its uniform holding that the Court of Claims must apply the "rules of evidence" carries with it the duty and the power of this court not to surrender its power but to enforce these rules of evidence when the Court of Claims refuses to be bound thereby;

4. Interest is necessarily a part of compensation to which one whose property has been commandeered and taken by the Government when payment of the "just compensation" found is not paid or tendered *when* determined and the property taken.

5. The Government has no right to pay a railroad corporation interest and withhold it from Claimant simply because it tries its action in the Court of Claims, whereas the railroad company tries its action in another court established by the Government. (Seabord Air Line Ry. Co. *vs.* United States, 261 U. S. 299);

6. The Government has no right to discriminate against Claimant and grant the Standard Oil Company relief refused Claimant, on the basis that Claimant brought its action in the Court of Claims, while the Standard Oil Company brought its action in a different court established by the Government. (Standard Oil *vs.* Southern Pacific, 265 U. S. 564.)

## IV.

The Court of Claims was established by the Government as a forum in which could be determined the "just compensation" to which the citizen is entitled for his property taken by sovereign power for public use.

The court says in the opinion in this case (p. 2): "there is no right to bring these suits against the United States" except "as Congress has consented" and "therefore" "the right" is "subject to such restrictions as Congress has imposed."

(1) The court in reviewing the "restrictions" imposed by Congress cites specifically: (a) "trial shall be by the Court without a jury" and (b) "appellate review" is forbidden when "the decision was against the Claimant and the amount in controversy was not in excess of three thousand dollars"; (c) "appellate review is not essential to due process of law, but is a matter of grace"; (d) appellate jurisdiction of this court shall be subject to "such exceptions" and be exercised under "such regulations" as *Congress may* prescribe.

By "grace" appellate review of this case has been granted; "the amount in controversy" exceeds "three thousand dollars"; Congress has made no exception "or regulation" excluding application of the rules of evidence.

This Court has uniformly held that the rules of evidence must govern the Court of Claims and Mr. Justice Pitney in delivering the opinion of the Court in Brothers *v.* U. S. (252 U. S. at p. 93), says:

> "For the purpose of our review, the findings of the Court of Claims are to be treated like the verdict of a jury."

The opinion cites as a rule controlling:

> "A finding by the Court of Claims of the facts of the case, established by the evidence, is in the nature of a special verdict."

(2) The record in the case as certified to this Court finds the facts:

(a) The tugs and barges known as the "Luckenbach fleet" were requisitioned and appraised on or about August 29th, 1917; and their value determined by the President at $1,500,000;

(b) Claimant was informed by letter dated October 4th, 1917, that commandant had been ordered to pay it that sum upon proof of ownership, "*if the condition of the vessels was the same as they were when theretofore inspected by the Government*";

(c) On October 8th, 1917, commandant was directed to take possession, "*owner Luckenbach Steamship Company*, giving to the owners, or their representative, a receipt for the ships," and pay said amount in full of just compensation, upon satisfactory proof of ownership and execution and delivery by the company of formal bill of sale—"*if they were in the same material condition as when inspected*";

(d) Said vessels were taken possession of by the Government; the tugs October 12th and the barges October 18th, 1917;

(e) An inspection or resurvey of them was made by the Government on October 17th, 1917, "*to determine whether they were in the condition specified by the Secretary of the*

*Navy as a requirement for the payment of the compensation fixed by the President";*

(f) On October 27th, 1917, Claimant executed and delivered to the United States bill of sale for all the tugs and barges;

(g) On December 7th, 1917, Claimant was paid 75% of the sum determined by the President on August 29th, 1917 as just compensation;

(h) At and for some time prior to the time said vessels were taken possession of by the Government, *all of them were in possession of Claimant and operated by it;* two of them owned by it, the remainder being the property of individual members of the Luckenbach family—all of whom conveyed their interest to Claimant October 19th to 24th inclusive, before Claimant delivered bill of sale to the Government on October 29th, 1917.

## V.

The facts found by the Court of Claims as certified in the record show that the Luckenbach fleet was for all practical purpose taken from Claimant on August 29th, 1917. After Claimant's property had been commandeered at that time by order of the Government, it was out of the power of Claimant to do business with its fleet—its income ended and common honesty demands payment on that date, or interest until paid.

Payment of 75% of the amount of just compensation determined by the President on August 29th, 1917 was not made until December 7th, [redacted]—three months and nine

days after commandeered and Claimant's business destroyed; one month and twenty-five days after the tugs and one month and nineteen days after the barges were taken possession of; and one month and eighteen days after the resurvey *"to determine whether they were in the condition specified by the Secretary of the Navy as a requirement for the payment of the compensation fixed by the President."*

## VI.

The opinion of the Court herein discloses the fact that the learned Justice was not advertent to some of the facts found by the Court of Claims as appearing in the certified record.

The Opinion (p. 7) says:

> "In short, while the United States was *prepared, willing,* and *offering when* the vessels were taken over to pay the sum now adjudged to have been just compensation at that time, the Claimant was not then in a position at the time to demand or receive compensation because as yet it was without good title and had not executed the bill of sale to the United States."

The record as certified is at variance with the alleged facts stated in the opinion, it is respectfully submitted.

Was the Government *"prepared"*, *"willing"*, and *"offering"*, to "pay the sum now adjudged to have been just compensation at that time"—October 12th and 18th, 1917?

The record says otherwise.

At the time the tugs and barges were taken possession of by the Government, the record shows that instead of being "*prepared*", "*willing*", and "*offering*", to pay for the property taken by sovereign authority and power, that there was no intent of paying at that time the amount theretofore determined as just compensation.

The authority to pay the compensation determined had "a string tied to it" and the money could not at that time be paid to Claimant although its business was destroyed and its property taken.

The authority to pay the sum determined as just compensation did not exist and the money could not be paid *until there was a resurvey of the tugs and barges taken, and the fact found that they were in the same condition as they were when theretofore inspected by the Government.*

This was a condition precedent to the payment specified by the Secretary of the Navy as a requirement and one that the defendant alone could meet.

The record directly and unequivocally contradicts the statement that the United States was "*prepared*", "*willing*", and "*offering*", to pay the sum now adjudged to have been just compensation at the time "*when*" the vessels were taken over.

Does the record bind the Court or is claimant alone bound so that facts in its favor are excluded?

This second survey, according to the record, was made on or about October 17, 1917, for the purpose of ascertaining if the barges and tugs taken by the Government were in the same condition "as when theretofore inspected by the Government."

The opinion admits that some six weeks elapsed after the delivery of the bill of sale before payment was tendered or made of 75% of the amount adjudged as just compensation at the time vessels were taken. The record shows that the tugs and barges were separately valued.

## VI.

According to the findings by the Court of Claims as certified in the record some time elapsed from the (a) commandeering of the vessels and fixing the just compensation at that time; (b) and from the time of taking possession of the vessels, (c) to the time that Claimant had opportunity to receive the amount determined as just compensation.

If the Seaboard case has not lost its force in this court, Claimant was entitled to receive interest, in any event, covering that interval of time. To deny this, it is submitted, is equivalent to repudiating the doctrine declared in the Seaboard case.

Claimant is entitled, it is respectfully submitted, on the "limited review on questions of law" which this court holds Congress has granted, to have "the findings of the Court of Claims treated like the verdict of a jury."

Whether there is *any* evidence to sustain the verdict found by a jury, is a "*question of law*" that this Court considers at almost every term of the Court on appeal reviewing the judgment based on such verdict rendered in a Circuit or District Court.

Is there any act of Congress that makes the findings of fact of the Court of Claims superior to the verdict of a jury

in the Federal Courts established under the provisions of the Constitution?

Is the Court of Claims bound by the rule cited by the Court on Page 3 of the decision, that the facts found are in the "nature of a special verdict" established "by the evidence."

If the findings of fact by the Court of Claims are in the "nature of a special verdict," then whether or not the same is "established by evidence" is a question of law. Has this Court no power to consider this question of law?

There is no act of Congress so "limiting" this Court.

If the power of this Court is so limited and hedged about that the Court of Claims may, without danger of review, certify as a fact that which is not supported by the evidences but is in conflict with the same, and thereby deprive the citizen of his property, then the Court of Claims is superior to this Court.

Is this Court ready to declare such to be the law?

It is respectfully submitted that the questions of law involved in this action are fundamental and far reaching. If the Court of Claims is clothed with the Czarlike power that the judgment in this case appears to hold, then the fact should be known so that this "Frankenstein" which Congress has created by the establishment of the Court of Claims may be shackled even more than it has been by the act of February 13, 1925.

Under any interpretation of the facts found by the Court of Claims, it is respectfully submitted, claimant is entitled to interest from October 29 to December 7, 1917.

Claimant is entitled to have the judgment of the Court of Claims reviewed without having its position misunderstood and the argument of its counsel misconceived.

Wherefore, your Petitioner respectfully prays for a rehearing of the appeal which was herein granted.

Luckenbach Steamship Company, Inc.,
Appellant,

By Peter S. Carter,
C. C. Daniels,
Attorneys for Appellant.

Of Counsel,
Peter S. Carter,
5 Whitehall Street,
New York City.

C. C. Daniels,
36 West 44th Street,
New York City.

SOUTHERN DISTRICT OF NEW YORK, }
UNITED STATES OF AMERICA, } ss.:

ROBERT C. THACKARA, being duly sworn, says that he is Vice President of the Luckenbach Steamship Company, Inc., petitioner herein; that he has read the foregoing Petition and knows the contents thereof and that the same is true to the best of his knowledge and belief.

ROBERT C. THACKARA.

Sworn to before me this 24th }
day of December, 1926. }

The undersigned each for himself hereby certifies that he has examined the foregoing petition, and that in his opinion the same is well founded and entitled to the favorable consideration of this Court, and that it is presented in good faith and not for delay.

Dated: New York, December 24, 1926.

PETER S. CARTER,
C. C. DANIELS,
Counsel.

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# In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 207

LUCKENBACH STEAMSHIP COMPANY, INC., APPELLANT

*v.*

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 6–10) is reported in 59 Ct. Cls. 628.

### JURISDICTION

The judgment to be reviewed was originally entered April 28, 1924 (R. 10). On June 26, 1924, appellant filed a motion for a new trial and for amended findings, which was seasonably made and entertained by the court. (R. 11.)

While the motion for a new trial was pending and undetermined, appellant filed on July 24, 1924, an application for and gave notice of appeal to this

Court. (R. 11.) On October 20, 1924, the court entered an order overruling the motion for a new trial and simultaneously entered an order allowing the application for appeal. (R. 11.) On November 13, 1924, appellant filed application for and gave notice of an appeal to this Court "from the order herein made on October 20th, 1924, denying and overruling motion of plaintiff for a new trial, and motion to find new and additional findings of fact and conclusions of law." (R. 12.) On November 15, 1924, the court entered an order as follows: "Appeal from the final order of the court allowed by the Court." If the appeal was properly taken, the jurisdiction of this Court is based on Sections 242 and 243 of the Judicial Code as they stood prior to the Act of February 13, 1925. Whether the steps taken resulted in a proper appeal is discussed in the brief.

## STATEMENT

This suit was brought in the Court of Claims to recover the value of five tugs and twelve barges acquired by the United States in October, 1917.

The Act of June 15, 1917 (Chap. 29, 40 Stat. 182), provided:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized * * *
>
> (e) to purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction

> or hereafter constructed, or any part thereof, or charter of such ship.
>
> * * * * *
>
> Whenever the United States shall * * * requisition, acquire or take over * * * any ship, * * * in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.
>
> * * * * *
>
> The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

An appropriation was made to carry out the provisions of this Act.

The appellant is a Delaware corporation. (R. 6.) On August 29, 1917, the Chief of Naval Operations advised the Board of Appraisal of the Navy Department that the President had directed the acquisition of the Luckenbach Fleet, consisting of five tugs and twelve barges, and directed that the Board of Appraisal report to the Secretary of the

Navy what would be just compensation to be paid for each vessel. The Board appraised the vessels and made a report fixing just compensation at $1,500,000 for the fleet, of which $1,184,092 was for the tugs and $315,908 for the barges. (R. 6.) Upon such appraisal and report, the President determined just compensation for the vessels to be the amounts therein specified. (R. 6.)

By a letter of October 4, 1917, the Secretary of the Navy informed the appellant of the amount of just compensation determined by the President and directed the appellant to deliver the vessels to the Commandant of the Third Naval District. The letter also informed the appellant that the Commandant had been ordered to pay appellant the sum of $1,500,000 " upon proof of ownership " and upon the execution by the appellant and delivery to the Commandant " of formal bill of sale of said vessels and their equipment." (R. 7.)

On October 8, 1917, the Secretary of the Navy directed the Commandant to take possession of the vessels, " owner, Luckenbach S. S. Company, giving to the owners, or their representative, a receipt for the ships " and authorized him " to pay to the owner, Luckenbach S. S. Company, upon satisfactory proof of ownership " and the execution by the company of a formal bill of sale, the sum of $1,500,000, and a further sum in payment for ordinary consumable stores. (R. 7.)

The Government took possession of the tugs on October 12, and of the barges on October 18, 1917. (R. 7, 9.) At this time and for some time prior thereto, the appellant had possession of and was operating all these vessels but was the owner of only two of them—tug *No. 5* and the barge *Seneca*. (R. 9.) The remaining fifteen vessels belonged to the individuals described in Finding IV, all members of the Luckenbach family. (R. 9–10.)

Subsequent to the taking of possession by the United States and on October 19 and 24, 1917, the individual owners executed bills of sale of the vessels to the appellant (R. 10).

The appellant was not satisfied with the value fixed by the President and refused to accept it. (R. 7.) On October 27, 1917, the appellant executed and delivered to the United States the bill of sale for the vessels set forth in Finding III. (R. 7–9.) In this bill of sale it was recited that (R. 8):

> Whereas the said tugs and barges were heretofore seized and requisitioned by the United States under the provisions of the act approved June 15, 1917 (Public No. 23), entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes;" and
>
> Whereas Luckenbach Steamship Company, Inc., the owner of said vessels, is dis-

satisfied with the value placed thereon by the President as provided for in the said act and has refused and does refuse to accept the same as fair and just compensation for the said vessels; and

Whereas it is its desire and intent hereby to confirm unto the Government of the United States the title to the vessels so seized and requisitioned by the United States, but reserving to itself all claims for compensation allowed to it by the said act and all rights and remedies for the determination, collection, suit for and recovery of the said compensation for and value of the said vessels.

Now, we, the said Luckenbach Steamship Company, Inc., reserving to itself all of said rights and remedies, does hereby confirm unto the United States the title to the whole of the said tugs and said barges or vessels, together with all machinery, masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging.

On December 7, 1917, the appellant was paid 75 per cent ($1,125,000) of the sum of $1,500,000 determined by the President to be just compensation. (R. 9.)

The Court of Claims found that: " Just compensation to the plaintiff for the taking by the United States of the aforesaid tugs and barges is the sum of $1,500,000," and it awarded judgment for $375,000. (R. 10.)

On January 27, 1925, the appellant filed in this Court a motion to remand, with directions to the Court of Claims to supplement the record in this Court by the inclusion of the appellant's motion for a new trial and for additional findings, and with a direction to the Court of Claims to reconsider the evidence and to find, or again refuse to find, each of the additional findings of fact requested in the motion previously made in the court below. The court deferred action on the motion to remand until the argument of the case on the merits.

The case presents three questions:

(1) Was the appeal properly taken?

(2) Should the motion to remand for additional findings be granted?

(3) Do the findings as made sustain the judgment?

The last question requires an inquiry into the matter of allowance of interest on the award.

## SUMMARY OF ARGUMENT

I. The appeal attempted in July, 1924, was premature and ineffective, because the pendency of the motion for new trial deprived the judgment previously entered of finality. The appeal attempted in November, 1924, from the order denying the motion for new trial and for additional findings was ineffective, because such an order is not appealable. The only way in which the jurisdiction of this Court may be sustained is by assuming

that the appellant intended by the appeal of July, 1924, to abandon and withdraw its motion for a new trial, or to assume that the appeal of November, 1924, was not intended as an appeal from an order denying a new trial, but as an appeal from the previous judgment rendered final by that order. In either case, the assumption as to the intention of the appellant would be directly contrary to his real intention as disclosed by the record.

II. The motion to remand seeks only to require the Court of Claims to reconsider the evidence and to give additional weight to some portions of the evidence. It is merely another way of asking this Court to consider the evidence and overturn the findings of the Court of Claims. There is a finding of fact on every material issue necessary to the decision of the case and to enable this Court to pass on any question of law involved in this suit.

III. The appellant is not entitled to interest, for if this suit is being prosecuted on the theory of a requisitioning of the seventeen vessels, the appellant as the owner of only two at the time of the acquisition and as the assignee of merely the claims of the owners of the other fifteen has no standing in this Court under Revised Statutes, Sec. 3477; and if this suit is based on the bill of sale, no interest is chargeable against the United States, especially where the amount ultimately recovered by the owner does not exceed the amount actually tendered to him under an appropriation therefor.

## ARGUMENT

If this case were to receive the treatment it deserves, the appellant's brief would be stricken from the file and the appeal dismissed.

There is but one point made in the brief worthy of discussion, and that relates to the question of interest as a part of just compensation. The greater part of the fifty pages of appellant's brief are devoted to incoherent railings at the Court of Claims, to distortions of the findings of that court, to statements wholly unsupported by the record, to the discussion of evidence in disregard of the explicit rule that on an appeal from the Court of Claims this Court will consider only the findings, and to the assertion that the rule of this Court that the findings and not the evidence shall be included in the record certified by the Court of Claims is "unconstitutional."

We will pass over this mass of irrelevant matter, to deal only with the points meriting discussion.

### I

### THE JURISDICTION OF THIS COURT MAY ONLY BE SUSTAINED BY A DISTORTED VIEW OF THE STEPS TAKEN BY THE APPELLANT

The appellant could, with advantage, have devoted a portion of its brief to explaining whether this case has been properly appealed. The judgment was entered April 28, 1924. The next step was on June 26th, when the appellant filed season-

ably, within the sixty days allowed by the rules of the Court of Claims, a motion for a new trial, which was entertained by that court. This motion, seasonably made and entertained, took away the final character of the judgment, which had been previously entered, and rendered it unappealable until the motion was denied or withdrawn. *United States* v. *Ellicott*, 223 U. S. 524, 539. Notwithstanding this situation, while the motion for a new trial was under advisement and undisposed of, the appellant filed on July 24th an application for an appeal. Unless that action is treated as an abandonment of the motion for new trial, it was inoperative and premature as an appeal, because the judgment was not final while a motion for a new trial was pending. It is the application for appeal, and not the order allowing it, that constitutes the taking of the appeal. *United States* v. *Adams*, 6 Wall. 101, 109:

> In other words, the framers of the rule, treating the appeal as taken within the meaning of the statute when the application is made for its allowance, provide that the delay in making out a proper statement of facts and judicial rulings, and then allowing the appeal (which C. J. Taney says, in *Hudgins* v. *Kemp*, " is merely an authority to the clerk to transmit the record "), shall not operate to defeat the appeal.

That the attempted taking of the appeal in July, 1924, was not intended as a withdrawal and an

abandonment of the motion for a new trial is shown by the fact that the appellant in November, 1924, attempted to take an appeal from the order denying the motion for new trial, and further by its motion in this Court to remand, with a direction to the Court of Claims to reconsider the motion for a new trial and for amended findings.

On October 20, 1924, the Court of Claims, disregarding the fact that the notice of appeal was premature and ineffective, entered an order allowing the appeal. This could have no more effect than an order allowing an appeal in a case where the application for appeal was made before any judgment was entered.

The appeal of November 13, 1924, states that it is "from the order herein made on October 20, 1924, denying and overruling motion of plaintiff for a new trial." That order was not, of course, appealable. If that notice of appeal is construed as intending to take an appeal from the judgment as made final and "entered" for the purpose of appeal, by the order of October 20th denying the motion, the jurisdiction could be sustained.

In *United States* v. *Ellicott*, *supra*, it appears, at page 538, that a judgment was entered in May, 1908; that a motion for a new trial, made by the United States, was overruled January 4, 1909; that the United States thereupon gave notice of appeal "from the judgment rendered in the above entitled cause on the fourth day of January, 1909."

This was construed as an appeal from the judgment which attained finality January 4, 1909.

In the present case, however, the appeal of November 13th makes no reference to any judgment and was palpably intended to effect an appeal from an order denying the new trial. It is not a violent assumption that the appellant was unaware that such an order was unappealable.

It thus appears that the jurisdiction of this Court may only be sustained, either by assuming an intent on the part of the appellant to withdraw its motion for a new trial by the filing of a notice of appeal in July, 1924, or by assuming an intention on the part of the appellant by its appeal of November 13th not to have attempted an appeal from the order denying the motion for a new trial. Both of these assumptions are violently contradicted by the record.

## II

### THE MOTION TO REMAND IS WITHOUT MERIT

There is a finding on every material issue necessary to enable this Court to decide the case. The manifest object of the motion to remand is to give the appellant the benefit of a new trial and to direct the Court of Claims to give more weight than it has previously given to the appellant's evidence.

The Court of Claims has not failed to make a finding on any essential issue. There is no finding covering a mixed question of fact and law which requires separation by the Court of Claims.

The contention that the Court of Claims did not exercise an independent judgment as to the value of the vessels but abdicated its function by relying on findings of the Board of Appraisal is without substance. There was a finding by the court as to the amount of just compensation. The judgment of the court as to the amount coincided with that of the appraisers. What appellant seems to object to is the statement in the opinion of the Court of Claims that (R. 10):

> Upon a careful review of all the evidence in this case we have reached the conclusion that the valuation placed upon the tugs and barges of the plaintiff by the Board of Appraisal is a fair one, and that the compensation awarded by the President is just.

This shows only that the court, on the evidence before it, reached the same conclusion as the Board of Appraisal.

## III

### THE APPELLANT IS NOT ENTITLED TO INTEREST

The Navy Department, acting through its officers, pursuant to the Act of June 15, 1917, carried on negotiations with the appellant for the acquisition of these seventeen vessels. It had the Board of Appraisal of the Navy Department appraise and determine their value.

On October 12, 1917, it took possession of the five tugs, and on October 18, 1917, of the twelve barges. If the acquisition of these vessels was a requisition-

ing, the title of the Government in and to the tugs and barges vested upon the dates of their taking—October 12 and 18, 1917. On these dates all title of the former owners was divested.

On the dates of the actual taking of possession the appellant was the owner of only one tug, tug *No. 5*, valued at $184,091, and one barge, the *Seneca*, valued at $68,182. Title to the remaining fifteen vessels was in the individuals named in Finding IV, members of the Luckenbach family. On October 19 and 24, 1917, these individuals executed bills of sale for these vessels to the appellant.

If the acquisition of these vessels by the United States was a requisitioning, these individual owners had no title in the vessels to assign by the bills of sale. They did have claims against the United States for compensation. These attempted assignments were ineffective as transfers of title. At most they would constitute an attempt to assign the owners' rights to claim compensation from the United States for the taking of the vessels. As an attempt to assign such claims, they are invalid as made in violation of Section 3477 of the Revised Statutes. This section reads as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment

> of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

Therefore, if the acquisition of these vessels amounted to a requisitioning, the appellant had a right to just compensation for the value of only one tug, tug *No. 5*, valued at $184,091, and one barge, the *Seneca*, valued at $68,182. Since the appellant has been paid the sum of $1,125,000, it has been paid by the Government a sum largely in excess of just compensation for such tug and barge, including all interest that could be properly allowable thereon. The Government is satisfied with this view of the case, as the statute of limitations has run against the individuals.

The only theory upon which the appellant can recover for all of the tugs and barges, only two of

which it owned when the Government took possession of them, is that the negotiations preceding the acquisition of these vessels brought about a sale and not a requisitioning.

In the first letter, dated October 4, 1917, from the Secretary of the Navy to the appellant with reference to these vessels, the appellant was directed to deliver the vessels to the Commandant of the Third Naval District, was informed that the President had determined just compensation for the vessels, and that the Commandant had been ordered to pay the appellant $1,500,000 " upon proof of ownership " and upon the execution by the appellant and delivery to the Commandant " of formal bill of sale of said vessels and their equipment." (R. 7.) On October 8, 1917, the Secretary of the Navy in directing the Commandant to take possession of the vessels authorized him " to pay to the owner, Luckenbach S. S. Company, upon satisfactory proof of ownership " and only upon the execution by the company and delivery to him " of formal bill of sale of said vessels and their equipment, acknowledging the receipt in full of just compensation therefor, a sum of one million five hundred thousand dollars ($1,500,000.00), and a further sum in payment for ordinary consumable stores." (R. 7.) The Navy Department took possession of the vessels on October 12 and 18, 1917.

The several individual owners on October 19 and 24, 1917, executed bills of sale for their several interests in these vessels to the appellant. And on

October 27, 1917, the appellant executed and delivered to the United States the bill of sale set forth in Finding III. (R. 8–10.)

The facts may require the conclusion that a sale and not a requisitioning was developed by the negotiations had between the parties, and that in fact they resulted in a sale of these vessels by the appellant to the United States. The statute authorized a purchase as well as a requisition. A bill of sale was unnecessary to vest title in the United States, if a requisitioning was intended.

This suit may, therefore, be upon the express agreement by the United States to pay the value of these vessels as of the date of the taking, and interest may not be added because of Judicial Code, Section 177. Treated as a purchase, the contract should be construed to obligate the United States to pay the fair value of the vessels at the time of the taking. That was the only matter in dispute. The appellant stated in the bill of sale that it was "dissatisfied with the *value placed thereon* by the President." (R. 8.) The case of *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, had not then been decided. The matter of inclusion of interest as part of compensation was not in the minds of the parties and was never mentioned directly or indirectly in the bill of sale.

If the contract had bound the United States to pay forthwith $1,500,000 for the vessels as their value, no interest could have been charged against the United States for the failure to pay promptly,

because under Judicial Code, Section 177, the United States is not obliged to pay interest unless expressly agreed upon. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American Co.*, 253 U. S. 330. The same principle applies where the contract was not for a stated sum but for the reasonable value. Treated as a requisitioning, the appellant was entitled to pay for two vessels and has been paid for seventeen. Considered as a contract of purchase no interest can be included on the purchase price, as none was expressly provided for.

An additional ground appears for not allowing interest. The finding of the Court of Claims was that just compensation " is the sum of $1,500,000." A fair view of this finding is that the court meant that $1,500,000 represented the value of the vessels at the time of the taking. Under the decision of this Court in *Seaboard Air Line Ry.* v. *United States*, *supra*, under ordinary circumstances, just compensation is not provided by a payment, at a date substantially later than the date of taking, of the value at the time of the taking without interest.

The rule announced in that decision should not, in the case of the United States, be so rigidly applied as to require interest to be calculated and added up to the very moment when the payment is made. The ordinary machinery for the payment of Government obligations will not, as a practical matter, permit of such an application.

The routine covering Government expenditures, the auditing of vouchers, the issuance of warrants, etc., makes it difficult and practically impossible to include interest up to the very moment that payment is actually made; and if that strict view of the *Seaboard Air Line Railway* decision is to be accepted, there will hardly be a case in which the United States can pay just compensation. With this in mind, it may fairly be said that the payment, with reasonable promptness after the taking, of the value at the time of the taking, the delay only resulting from the ordinary formalities and verification of ownership, does not require the inclusion of interest. On this view the short delay occurring after the taking, until the $1,125,000 was paid, should not require the addition of interest on that sum.

With respect to interest on the balance of the compensation, $375,000, it may be said that in a case where the United States has determined upon compensation which is in fact just, and offers to pay it at the time of the taking, and an appropriation is available, and a disbursing officer is actually directed to pay it, and it appears no actual coin or money or check was tendered or offered, because the owner of the property being advised of the amount to be paid serves notice that he will refuse to accept it, the Government should be relieved from that time on of the payment of interest, with the same effect as if gold coin in the required amount had been physically offered. If this be not so, then in any case in which the Court of Claims

does award just compensation, the claimant who refuses to take the sum awarded and delays the payment by an unsuccessful appeal to this Court would be entitled to interest pending the appeal in order to give him full compensation, although the Government was at all times ready to satisfy the judgment.

The reasons and theory back of the rule that where a tender of payment has been made and kept open of the amount which is actually due the debtor will thereafter be relieved from the payment of interest apply with full force and effect to the situation which we are now considering. The United States offered to pay all to which the appellant was entitled. Interest as damages is allowed upon the theory that by the detention of the money the creditor has suffered. If he has suffered here, it is his own fault. He could have had the money and had the use thereof all during the time for which he claims interest. The United States should not be made to suffer this loss because of the unjustified and unfounded claims of the appellant.

At the time these vessels were taken there was in existence the Naval Emergency Fund created by the Appropriation Act of June 15, 1917, *supra*. This Appropriation Act set aside sufficient funds for the purposes therein specified. This sum of money was separated and set apart from the other funds of the United States which were unappropriated and in the Treasury. When these vessels were taken and the President determined

the just compensation therefor, a liability was created upon this appropriation to the extent of that determination, and in view of the fact that the general statutes of the United States then in existence prohibited officers of the Government from expending money without an existing appropriation, the creation of the liability for one and one-half million dollars under this requisition was by operation of law a further segregation and separation and setting apart of this amount and this sum from the funds of the United States. It then and thereby became impossible for the Government to use this sum so appropriated until the charge upon such appropriation had been removed.

While no proof was offered to show that $375,000 of the appropriation has been kept available in the Treasury, the Court should assume that the requirements of the law have been fulfilled.

It is therefore submitted that as above stated all the reasons for the application of the rule that tenders kept open prevent the accruing of interest apply to the instant case.

The appeal should be dismissed or the judgment affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
*Solicitor General.*
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FEBRUARY, 1926.

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# SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1926.

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| Luckenbach Steamship Company., Inc., Appellant, *vs.* The United States. | Appeal from the Court of Claims. |

[November 23, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit to recover a balance alleged to be due for several barges and tugs, the possession and title to which were taken over by the United States under the Act of June 15, 1917, c. 29, 40 Stat. 182. The compensation fixed at the time by the President not being satisfactory to the claimant, three-fourths of it was paid, and the claimant, conformably to the Act, sued to recover a further sum which, with what was paid, was alleged to be just compensation. The Court of Claims found that the amount fixed by the President was just and entered judgment for the claimant for the one-fourth remaining unpaid. 59 Ct. Cl. 628. The claimant being still dissatisfied brought the case here.

The judgment was entered April 28, 1924. The claimant seasonably moved for a new trial and included in the motion a request for amended findings. While that motion was pending the claimant, becoming apprehensive lest the time allowed for an appeal might be running, filed with the clerk an application for an appeal from the judgment. Thereafter the motion for a new trial, with the request for amended findings, was denied, and the application for an appeal was then brought to the Court's attention and allowed. A little later the claimant applied for an appeal from the order refusing a new trial and amended findings and the court allowed that appeal.

Counsel for the United States insist that neither appeal was effective. Plainly the second was not, for it was from an order which was not appealable. But the first was from the judgment

and we think it was well taken. The only infirmity suggested is that the application was premature in that it was made before the motion for a new trial and amended findings was disposed of. It is true that with that motion pending the judgment was not so far final as to cause time to run against the right to appeal, *United States* v. *Ellicott*, 223 U. S. 524, 539; but while the application was thus premature it was not a nullity. Evidently it was intended to be pressed only if and when the motion for a new trial and amended findings was denied. The court so regarded it, and therefore gave effect to it after disposing of the pending motion. That this was right is shown in *Ex parte Roberts*, 15 Wall. 384, 385.

After the record was filed in this Court the claimant moved that the case be remanded to the Court of Claims with directions either to find or refuse to find each of the several matters specified in the request for amended findings, or, in the alternative, to include in the record the motion for a new trial and that request, together with the evidence on which they were based. Consideration of the motion to remand was postponed to the hearing on the merits, and that hearing has been had.

The presentation of the case on behalf of the claimant has proceeded on the assumption that our power to review is as broad as the power of the Court of Claims to hear and determine in the first instance, and that such a review if not otherwise provided for is vouchsafed by the due process of law clause of the Fifth Amendment. But the assumption is a mistaken one. The Court of Claims is a special tribunal established to hear and determine suits against the United States on claims of specified classes. Except as Congress has consented, there is no right to bring these suits against the United States, and therefore the right arising from the consent is subject to such restrictions as Congress has imposed. *McElrath* v. *United States*, 102 U. S. 426, 440. One of these is that the trial shall be by the court without a jury. Another, in force until changed by the Act of February 13, 1925, c. 229, 43 Stat. 936, forbade an appellate review where the decision was against the claimant and the amount in controversy was not in excess of three thousand dollars. Others, still in force, limit the scope of the review where one is permitted. And, apart from the nature of these suits, the well settled rule applies that an appellate review is not essential to due process of law, but is matter of grace. *McKane* v. *Durston*, 153 U. S. 684, 687; *Andrews* v. *Swartz*, 156

U. S. 272, 275; *Kohl* v. *Lehlback*, 160 U. S. 293, 297, 299; *Reetz* v. *Michigan*, 188 U. S. 505, 508; *The Francis Wright*, 105 U. S. 381, 386; *Montana Company* v. *St. Louis Mining and Milling Company*, 152 U. S. 160, 171.

The Constitution, Art. III, sec. 2, declares the appellate jurisdiction of this Court shall be subject to "such exceptions" and be exercised under "such regulations" as Congress may prescribe. This provision was much considered in *The Francis Wright, supra*, and the views there expressed are particularly apposite here. The Court said (p. 386):

"Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for a trial of all parts of a case. Everything beyond that is a matter of legislative discretion, not of constitutional right."

Save in special cases not needing present mention, Congress never has provided for a general review by this Court of cases coming from the Court of Claims. On the contrary—and probably because that court is composed of five judges, all usually hearing cases together and the concurrence of three being necessary to a decision in any case—Congress has pursued the policy of permitting only a limited review on questions of law; and the procedural rules applicable to such cases which this Court has promulgated under congressional authorization always have recognized that policy. The rules in force when this case was before the Court of Claims are copied in the margin.[1]

[1]RULE I.

In all cases hereafter decided in the Court of Claims, in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

(1) A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

(2) A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence estab-

Others promulgated since, and equally recognizing the same policy, are also copied there.[2]

This Court uniformly has regarded the legislation and rules as confining the review to questions of law shown by the record when made up as the rules direct. Bills of exception are not recognized in either the legislation or the rules; nor is there other provision

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lishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

RULE IV.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

RULE V.

In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.

[2]The following rules partly modifying those just set forth were promulgated June 8, 1925, 266 U. S. 683:

Rule 38.

JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI.

(See sec. 3(b) of the Act of February 13, 1925.)

1. In any case in the Court of Claims where both parties request in writing, at the time the case is submitted, that the facts be specially found, it shall be the duty of that court to make and enter special findings of fact as part of its judgment.

2. In any case in that court where special findings of fact are not so requested at the time the case is submitted, a party aggrieved by the judgment may, not later than twenty days after its rendition, request the court in writing to find the facts specially; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a part of its judgment. The judgment shall be regarded as remaining under the court's control for this purpose.

3. The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found.

for bringing the evidence into the record or including therein the various rulings involved in applying to the evidence presented the rules which mark the line between what properly may be considered and what must be rejected. As long ago as *Mahan* v. *United States*, 14 Wall. 109, 111, this Court said of the rules that they could not be examined "without seeing that the purpose was to bring nothing here for review but questions of law, leaving the Court of Claims to exercise the functions of a jury in finding facts, equivalent to a special verdict and with like effect." Other cases establish that where the findings are ambiguous, contradictory or silent in respect of a material matter, or appear on their face ill-founded in point of law, the case may and should be remanded for corrected or additional findings, but that the mere assertion on the part of a complaining party that they are against the evidence or not supported by it, or give too much or too little weight to particular evidence, affords no ground for so remanding the case, because that is to be done only where the need for correction or addition is apparent either on the face of the findings or when they are examined in connection with the pleadings. *United States* v. *Adams*, 6 Wall. 101, 110-112; *Moore* v. *United States*, 91 U. S. 270; *United States* v. *Smith*, 94 U. S. 214, 218-219; *United States* v. *Clark*, 96 U. S. 37, 38-39; *McClure* v. *United States*, 116 U. S. 145; *Union Pacific Ry. Co.* v. *United States*, 116 U. S. 154; same case, 116 U. S. 402; *District of Columbia* v. *Barnes*, 197 U. S. 146, 150; *Brothers* v. *United States*, 250 U. S. 88, 93.

In this case the findings are direct, free from ambiguity, consistent, fully responsive to the issues, and contain nothing indicating that they or any of them are ill-founded in point of law; and the unavoidable conclusion from them is that the judgment is for the right sum, unless there be merit in a contention respecting interest to be noticed later on. So, whether taken by themselves or in connection with the pleadings, they are not open to criticism, unless possibly as to the matter of interest.

A copy of the motion for a new trial and request for amended findings is exhibited with the motion to remand. The motion for a new trial brought nothing new into the case, and the order overruling it is not open to review. The request for amended findings asked that two of the findings be changed—one by including therein matters which at most are plainly evidential and subordinate, and therefore not to be included in a finding of ultimate facts; and

the other by increasing the amount found to be just compensation for the vessels at the time they were taken over from $1,500,000 to $4,777,000—more than three times what the court found it to be. Whether one amount or the other was the true one was a question of fact. The court refused to change the finding and thereby affirmed that the fact was as stated therein. This Court cannot re-examine the question, and the fact that the claimant is still dissatisfied constitutes no ground for remanding the question to the Court of Claims for re-examination by it. As part of its request for amended findings the claimant tendered twenty-seven additional findings and asked that they be adopted. All were rejected. There is no showing that they had been tendered theretofore in conformity to the fifth rule, before quoted; and if that was not done the claimant was not in a position to press them. *United States* v. *Driscoll*, 131 U. S. Appendix clix. As to many, if not all, there are also other reasons why the court was free to reject them. Many state matters which, even if true, are evidential only; some are merely argumentative, and others contain statements having no relation to the issues under the pleadings. It must be held therefore that neither the motion for a new trial nor the request for amended findings gives any support to the motion to remand. Independently of them it lays no foundation for granting what it asks.

The remaining question is whether there should have been an allowance of interest. The vessels were not taken over at the outset, nor until after the compensation had been fixed by the President at $1,500,000 and the officer who was to take them over had been instructed to pay that sum to the claimant on receiving the vessels with proof of ownership and bill of sale. The claimant was advised of this, and possession of the vessels was passed to the officer a few days later. But it developed that the claimant, although theretofore in possession and operating the vessels, was the real owner of only two of them. The claimant then procured bills of sale to it from the owners of the other vessels and executed a bill of sale to the United States for all. This was about two weeks after possession was passed to the officer. The officer was prepared and willing to pay the full $1,500,000 when the bill of sale was delivered to him, but the claimant was not willing to accept it as full compensation. Afterwards the claimant elected to accept three-fourths of it, and to reserve a right to sue for enough more to make

full compensation. The three-fourths was then paid. This was about six weeks after the delivery of the bill of sale. The judgment awards the remaining one-fourth as a sufficient sum, with that already paid, to make just compensation for the vessels at the time they were taken over. In short, while the United States was prepared, willing and offering when the vessels were taken over to pay the sum now adjudged to have been just compensation at that time, the claimant was not then in a position entitling it to demand or receive compensation because as yet it was without a good title and had not executed a bill of sale to the United States: and after it became entitled to compensation it rejected the offer, which was still outstanding, to pay that sum in full payment and elected to accept three-fourths as a partial payment and to take chances on enlarging the compensation by resorting to this suit against the United States. The effort to obtain an enlargement has resulted, as already shown, in establishing that the amount offered and rejected was all that justly could have been demanded. In these circumstances we think such postponement as has occurred in the actual payment of the compensation is attributable entirely to the claimant, and therefore that an allowance of interest to the time of payment is not in this case made essential by the constitutional provision expounded and applied in *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 306, and *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123.

*Judgment affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*